UNIVERSITY LIBRARY. LAW COLLEGE.

The Madras Law Journal.

Vol. XX.] APRIL, 1910. [Part VIII.

THE VAKILS' GATHERING.

The annual gathering this year was held on the 29th April on the invitation of Mr. Ethiraja Moodaliar at his residence. Mr. K. Srinivasa Aiyangar read a paper on the Study of the Growth of Hindu Law which is published in these columns and the learned Advocate-General concluded the programme with a short and interesting speech. The learned Advocate-General referred to the year that had passed as one eventful to the profession. We think there could be no denying that the year referred to by the learned Advocate-General was not merely eventful to the Profession but was also interesting.

The Profession will be interested in knowing that the High Court have made a rule allowing double Counsels'-fees in cases in which the presiding Judge thinks fit to allow the same. This must be really gratifying both to the Profession and the litigants, and the thanks of the Profession are due to the High Court for making this just and equitable rule.

Again, the High Court have modified some of the rules relating to apprentices and some of these modifications at any rate will be regarded as beneficial to the persons entering the profession. First of all the rule requiring an apprentice to obtain 50 p. c. of the marks in the examination, without passing which he will not be qualified to be enrolled as a Vakil of the High Court, has been amended by reducing the minimum to 40 p. c. In a country where a system of examinations by which the youth of the country are made to waste their energies during the best portions of their life prevails, it is with a great feeling of relief that one hears about the reduction in the percentage of marks to be obtained by a candidate for the passing of examinations. The apprentice has already passed the examinations in law prescribed by the University, but before

he can be enrolled as a Vakil of the High Court he has not only to apprentice himself under a practising High Court Vakil and attend the High Court for a full year, but also to pass an examination, failure in which necessarily affects the hopes and prospects of the person and postpones his settlement in life. The curtailment of examinations will be highly conducive to the good and welfare of the people of this country and a reduction in the percentage of the minimum marks to be obtained may well be regarded as a step towards the attainment of this end. The reduction in the percentage will be highly appreciated by those entering the profession of law.

The next modification relates to the rule requiring affidavits from the master taking an apprentice. According to the old rule, now abolished, before an apprenticeship contract can have any operation, the master (whether an Advocate, Vakil or an Attorney) must file an affidavit to the effect that he has been himself duly admitted and is practising as such and that the contract of apprenticeship has been duly executed by himself and the apprentice. Why a statement by an Advocate, Vakil or Attorney to the effect stated above is not enough is not easily explicable unless it be that the High Court does not trust the word of their own officers unless sworn to. It is not also explicable why the rule should require an affidavit or even a statement to the effect that the Advocate, Vakil or Attorney has been enrolled as a Vakil when that fact can easily be ascertained from the Court Rolls kept for the purpose. Any how the High Court must be congratulated upon the modification of the rule requiring an affidavit from members of the Profession in respect of this particular matter.

The next and the last modification relates to the introduction of a course of lectures on professional etiquette to be delivered by the professional gentlemen to be appointed by the High Court. The apprentice is required to attend a minimum number of these lectures before he can be enrolled. We need hardly say that owing in part to the system of training and education received by students of law in this Presidency, and owing partly to the contract with eminent members of the bar, and last, if not least, owing to his having profited by the experience and lessons of those who have gone before in the Profession, the youngest member of the bar has before him far loftier and nobler ideals

of the Profession than his compeer a few generations ago. A higher standard of rectitude and professional morality is not merely set before him but demanded of him, and there can be no doubt that most of the members of the Profession maintain the standard rigorously. At the same time, however, owing to the progress of time, fresh questions of professional morality and etiquette have cropped up and it is therefore fitting that the High Court should inaugurate a series of lectures in order that a person entering the profession may become acquainted with the difficulties he may have to encounter in the practice of his profession and know how best to conduct himself in after life.

While on this subject of professional etiquette we have to note with much regret that during the year under review by the Advocate General there have been rather a large number of proceedings against Vakils and Pleaders. Nobody denies that reprehensible conduct on the part of any member of the Profession should be proceeded against and that the disciplinary jurisdiction of the Court whose officer he undoubtedly is should be exercised. At the same time, however, the initiation of proceedings, in some cases may be due rather to overzeal and care must be taken that proceedings are not initiated except in the most clear cases.

If the construction which the High Court have placed both upon Clause 10 of the Letters Patent and upon S. 13 of the Legal Practitioners Act, *viz.*, that they are not restricted to cases of professional misconduct is to be adhered to, we think the High Court should impose certain safeguards in order that there may not be an abuse of the powers conferred. However, in a few of the cases in which the High Court found the practitioner guilty of misconduct some important questions as to the extent of jurisdiction have been raised and discussed. It is a matter for congratulation that the High Court has thought fit to give notice to the Vakils Association of cases wherein any charge was formulated against a Vakil, so that the Association may have an opportunity of representing its own view of the matter in each case. We hope this practice will invariably be followed to the advantage both of the Profession and the Judges themselves. On the one hand, the voice of the Association will be effective as the practitioner concerned will have the condemnation of his

own brethren if he happens to deserve it and there will be less room for false sympathy; on the other hand, the Judges will have the strength of the support of a responsible body like the Vakils Association in its condemnation of professional misconduct.

A few words more about the gathering itself. There were some suggestions made about inviting Judges and Mofussil Vakils. It was said that Barristers invited Judges and that, therefore, the Vakils also should invite Judges to their gathering. The reasoning, however, is not quite accurate. What the Barristers do, and what is being done in England and other countries, is to invite Judges to a special dinner given by the members of the Bar. We think this may be usefully done without reference to any decision which the Vakils' Association may come to upon the question whether the invitation to the annual function should extend to Judges also.

With reference to the invitation to the Mofussil Vakils it has been said that there have been very few applications from Mofussil Bar Associations for being affiliated, but we think it is the duty of those concerned in the management of the Association to get more local members enlisted in the first place before they complain about the mofussil. As it is, we find that there is not even a third of the Vakils of the High Court practising here who are members of the Association, and before the Association can be made to do any useful work its ranks ought to be strengthened, so that it may not be said that there are a considerable number of Vakils who are non-members and whom, therefore, the Association cannot be said to represent.

REMEDIES OF MORTGAGOR AND MORTGAGEE WHEN THE SAME PERSON HOLDS TWO MORTGAGES OVER THE SAME PROPERTY.

The recognition of a right in a mortgagor to create a second mortgage over the same property seems to be a very doubtful blessing when the second mortgage is created in favour of the first mortgagee himself. The uncertainties of the Indian processual law as to the remedies of the mortgagor and the mortgagee in such cases are so great as to make the position of either of them equally unenviable. On a former occasion we

drew attention to the conflicting views of the different High Courts as to the course to be pursued by a person holding two mortgages over the same property (19 M. L. J. 433). A similar conflict of judicial opinion exists as to the rights and remedies of the mortgagor in such cases, and the reasoning of the Courts in both classes of cases seems to be, to a certain extent, interdependent. The Allahabad High Court, which has held that a person holding two mortgages over the same property can bring a separate suit in respect of each of them, likewise holds that the mortgagor in such cases can separately redeem each of the mortgages. On the other hand, in the recent decisions of the Madras and the Bombay High Courts in *Doraisami* v. *Venkatasesha*[1] and *Keshava Ram* v. *Ranchhod*[2], the Court, in deciding the question of the mortgagee's remedies, dwelt incidentally also on the mortgagor's rights of redemption in such cases. So far as the frame of the mortgagee's suit is concerned, it is worth inquiring whether the provisions of Order 34, Rule 1 of the New Code of Civil Procedure do not necessitate a reconsideration of the arguments on which the decision in *Doraisami* v. *Venkatasesha*[1] is based ; and such a reconsideration, would, in some measure, affect also the question of the mortgagor's right of redemption. But before dealing with that question we may briefly discuss the other ground on which the *dictum* of the Madras High Court (followed in the *Bombay case*[2]) as to the necessity of the mortgagor redeeming both the mortgages together, is based.

Referring to S. 61 of the Transfer of Property Act the learned Judges say: "No doubt (it) abolishes the doctrine of 'consolidation of mortgages' over different properties * * * * but that very section implies, as is shown by the illustration, that if the different mortgages are in favour of one and the same person, not in respect of different properties but over the same property, the mortgagor cannot seek to redeem any one mortgage without redeeming the additional mortgages also." This view has been adopted in a recent case before the Madras High Court, where the point actually arose for decision (S. A. 1086 of 1907). The Allahabad High Court, on the other hand, has all along held that no such inference can be legitimately drawn

1. (1901) I.L.R. 25 M. 108. 2. (1905) I.L.R. 30 B. 156.

from S. 61 or its illustration, and that the mortgagor will be precluded from redeeming the mortgages separately only when there is a special agreement between the parties that the mortgages should all be redeemed together—see *Tajjo Bibi* v. *Bhagwan Prasad*,[1] *Khuda Baksh* v. *Alimunnissa*[2] and the other cases reviewed in *Ranjit Khan* v. *Ramdhan Singh*.[3] Among the commentators on the Act, SIR H. H. SHEPHARD approves of the Madras view, and DR. GOUR seems to incline to the Allahabad view; but there is little discussion by either of them on the point.

We are constrained to think that there is some force in the remark of DR. GOUR (S. 1195 of the *Commentaries* on the *Transfer of Property Act*) that the observation in *Doraisami* v. *Venkatasesha*[4] confuses tacking with consolidation. S. 61, no doubt, refers only to mortgages over *different* properties, but that is because the doctrine of consolidation, which it repealed related only to that class of cases (FISHER on *Mortgages*, S. 1210). It does not seem legitimate to infer therefrom that the Indian Legislature meant that where the mortgages cover the *same* property, they should be redeemed together. Such a rule must be established on some underlying principle of its own and not by an implication from the language of a section admittedly dealing with a different question.

There is, indeed, a somewhat analogous rule, in the English law, which allows a mortgagee advancing sums by way of further charge on the mortgaged property to insist that the mortgage shall not be redeemed without payment of all the moneys that had been advanced by him on the faith of the security (COOTE'S *Law of Mortgage*, p. 1168; ROBBINS, p. 1147, &c.). But before applying that rule in this country where redemption is not an equity but a statutory right (Cf. *Webb* v. *Macpherson*[5]) one cannot help asking what are the grounds on which it is based. Both the English text-books above referred to mention the rule when dealing with the question of 'accounts' between the mortgagor and the mortgagee, and they do not discuss the reason of the rule. Justice *Story* points out that the

1. (1893) I.L.R. 16 A. 295.
2. (1904) I.L.R. 27 A. 313.
3. (1909) I.L.R. 31 A. 482.
4. (1901) I.L.R. 25 M. 108.
5. (1903) I.L.R. 31 C. 57 (P.C.)

rule was not *in this form* known to the Roman Law (see *Equity Jurisprudence*, note to S. 418.) The broad doctrine of the Civil Law (referred to in *Allu Khan* v. *Roshan Khan*[1]) has not been followed in this country since the enactment of the Transfer of Property Act, and it is difficult to see any general principle of universal equity on which the English form of the rule could be based. MR. FISHER considers that "the principles on which the rule (of the English law) is founded are substantially the same as those which govern 'tacking' as against mesne incumbrancers" (Ss. 1160-1162) and this apparently is also the view of Justice *Story* (see *Equity Jurisprudence*, § 1010 and Note). If so, it is open to doubt whether the rule can properly have application under a system that recognises no distinction between the 'legal' and the 'equitable' estate and under which the mortgagee is not the full owner of the *legal* estate. No doubt S. 80 of the Transfer of Property Act abolishes 'tacking' (it may be noted that the word itself is not used in the body of the section) only as against *mesne incumbrancers*, but the inapplicability to this country of the doctrine of tacking in *any* form rests not on the ground of statutory prohibition but on the fact that the nature of a mortgage as defined in the Anglo-Indian law lacks the essentials on which alone that doctrine could be based.

It may also be pointed out that, where the two mortgages are on the *same* property, the mortgagee's interests will in no way be jeopardised by the mortgagor being allowed to redeem each of the mortgages separately. This circumstance differentiates such cases from those to which the rule of consolidation used to be applied to save the mortgagee from being left with an insufficient security for one of the debts. Where the mortgagor redeems one of several mortgages on the same property, the mortgagee only gains thereby, for he gets a better security for the remaining debt. It may, however, be said that where one of the mortgages is usufructuary and the other simple, it would be disadvantageous to the mortgagee to have to part with his possession before the simple mortgage is also discharged. But it is extremely doubtful whether it could ever have been intended by the Legislature that the mortgagee should thus be allowed practically to convert a simple into a usufructuary mortgage, and it is noteworthy

1. (1881) I.L.R. 4 A. 85.

that the mortgagor's right to recover possession on the discharge of a usufructuary mortgage is not left to be understood as incidental to redemption (under S. 60) but is expressly provided for by S. 62.

There is also a *dictum* in *Ramaswami Ayyar* v. *Vythianatha Ayyar*[1]; but this again, besides being unnecessary for the decision, is a mere assumption and carries us no further. The learned Judges there say : "If the same property be subject to different mortgages in favour of the same (person) the mortgagor cannot, from the very nature of the right of redemption, seek redemption without redeeming all the mortgages and the mortgagee ought, under Expl. II to S. 13 of the Civil Procedure Code,to insist upon all the mortgages being redeemed if the suit is brought for the redemption of only one or some of the mortgages." Reference is made to *Sri Gopal* v. *Pirthi Singh*[2] in support apparently of the latter part of the above proposition. (See also *Nattu Krishnama Chariar* v. *Annangura Chariar*[3].) With all deference it is submitted that this is a misconstruction of the decision of the Judicial Committee. As explained by the Calcutta High Court in *Mahabir Pershad* v. *Prabhu Singh*[4], the rule of *res judicata* laid down by the Judicial Committee in the Allahabad case, does not require the mortgagee to set up a prior mortgage whose existence or priority is not questioned, but is *admitted* by all concerned. The rule of *constructive res judicata* would come into operation, only on the assumption that the mortgagee was, as a matter of substantive law, entitled to, or perhaps even bound to, insist on being redeemed in respect of all his mortgages together.

Coming now to the argument based on the rules of law as to the frame of mortgage suits, the learned Judges who decided *Dorasami* v. *Venkataseshayyar*[5] and *Keshavram* v. *Ranchhod*[6] assume that S. 85 of the Transfer of Property Act required even *prior* mortgagees to be made a party to a puisne mortgagee's suit, and that such prior mortgagees, when so added, *must* ask their mortgages also to be adjudicated upon and decreed. *Venkataramana Iyer* v. *Gompertz*[7] suggests a somewhat different

1. (1903) I.L.R. 26 M. at p. 776.
2. (1902) I.L.R. 24 A. 429 (P. C.)
3. (1907) I.L.R. 30 M. 353.
4. (1908) 9 C.L.J. 78.
5. (1901) I.L.R. 25 M. 108.
6. (1905) I.L.R. 30 B. 156.
7. (1908) I.L.R. 31 M.425.

view ;and *Radhakrishna Iyer* v. *Muthusami Sholagan*, [1] in going further than *Rangasami Nadan* v. *Subbaraya Iyen*[2] and granting a decree for sale subject to a prior usufructuary mortgage in favor of the plaintiff, departs altogether from the principle underlying *Dorasami* v. *Venkataseshayyar*.[3] Now, Rule 1 of Order 34 of the New Code of Civil Procedure expressly enacts, by way of explanation, that "a puisne mortgagee may sue for foreclosure or sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgagee." This provision, dealing with the suits both of mortgagors and of mortgagees, is, it is submitted, completely at variance with the assumption underlying some of the observations in *Dorasami* v. *Venkataseshayyar*[3] and the *dictum* quoted above from *Ramasami Ayyan* v. *Vythinatha Ayyan*, [4]and these can therefore be no longer considered binding. Viewing the question only as one of procedure, it can make no difference for this purpose whether the puisne mortgagee and the prior mortgagee are different persons or are one and the same person, unless the principle of S. 43 of the Old Civil Procedure Code (now O. 2, R. 2) can be held to apply in the latter case so as to bar a second suit. Though the Judicial Committee, in *Sri Gopal* v. *Pirthi Singh*, [5]refrains from saying anything on the question of the application of S. 43 to such a case, there can, we think, be little doubt that that section has no application (see *Sesha Aiyyar* v. *Krishna Ayyangar*.)[6]

It may, however, be noticed that the Explanation to O. 34, R. 1, of the New Code will not apply when, as on the facts of *Dorasami* v. *Venkataseshayyar*[7] a *prior* mortgagee is seeking a decree for sale *subject to a puisne incumbrance*. The puisne incumbrancer is a person 'interested in the right of redemption', and, under the body of the rule, he should be joined as a party in the prior mortgagee's suit. But when he is so added, the law nowhere requires that he is bound to ask for an adjudication in respect of his puisne mortgage (even though it may not be questioned by the mortgagor) or ask for a sale in respect of it. [On the other hand, see Form of the decree No. 7, Cl. (3) in App. D. to the New Code.] There cannot, of course, be a sale on the first mortgage, keeping alive a puisne incumbrance, for such a sale conveys the interests of the mortgagor and the

1. (1908) I.L.R 31 M. 530.
2. (1907) I.L.R.30 M. 408.
3. (1901) I.L.R. 25 M. 108.
4. (1903) I.L.R. 26 M. at p. 776.
5. (1902) I.L.R. 24 A. 429.
6. (1900) I.L.R. 24 M. 96.
7. (1901) I L.R. 25 M. 108.

mortgagee as they were *at the date of the first mortgage* and must, therefore, necessarily sweep away the intermediate incumbrance. But it does not seem to follow from this, that in a suit on one of the mortgages, the other also, if in favour of the same person, must necessarily be *put in issue.* (Cf. *Srinivasa Rao Saheb* v. *Yamunabhai.*[1])

Reliance is placed, in some of the cases already referred to, on S. 99 of the Transfer of Property Act, or rather the policy underlying it, as supporting the view that a mortgagee should, not even in execution of a mortgage decree, be permitted to bring the mortgaged property to sale subject to another mortgage in his own favour. As observed by DR. GHOSE, the principle of S. 99 has always been difficult to understand ; and in the only case in which the point actually came up for decision, the Madras High Court held that that section did not preclude the sale of mortgaged property under a mortgage decree, when the sale is sought to be held subject to *another* mortgage in the decree-holder's favour. (*Abdul Rahim* v. *Mahomed.*[2] Cf. also *Kashi Pershad* v. *Jamuna Pershad*)[3]. It is now settled that a mortgagee is under no *inherent disability* in respect of purchasing the equity of redemption at an execution sale (see *Ikkotha* v. *Chakkiamma*,[4] *Kuttan Nayar* v. *Krishnan Mussad*).[5] Hitherto, he could have purchased it only at a sale brought about by others. But, unlike S. 99 of the Transfer of Property Act, the corresponding provision of the New Civil Procedure Code (Order 34, R.14) precludes the mortgagee from selling the equity of redemption in execution of money decrees, *only* when they are in respect of a claim arising under the mortgage. It follows that in respect of other money claims which he may have against the mortgagor, the mortgagee may in future attach and sell the equity of redemption. Henceforward there is, therefore, even less reason for contending that in execution of a decree *for sale* in respect of one mortgage, the mortgagee cannot sell the mortgaged property subject to *another* (of course prior) mortgage in his own favour.

S. V.

---

1. (1905) I.L.R. 29 M. 84.
2. (1892) 2 M.L.J. 188.
3. (1904) I.L.R. 31 C. 922.
4. (1903) I.L.R. 27 M. 428.
5. (1902) 12 M.L.J. 390.

A STUDY OF THE GROWTH AND DEVELOPMENT OF HINDU LAW.*

There is no need to emphasise the importance of the study to a professional gathering. It is not the study of the fossilized remains of a dead system that I advocate, but a study of the living law which has done service for countless generations of Hindus and which has adapted itself to the growing needs of a progressive community. It has been able to do this by an emphatic recognition of *Sadacharam* or the practice of the people, or, what would be called in England, the custom of the realm, as the basis of all civil law.

As the practical importance of the subject for us is only with regard to the law of property, it may be useful to trace the root ideas in our ancient law and their growth and development. The system of judicature developed in our ancient books helped in the growth. The Hindu Law was not the declared will of the Sovereign, nor was it the fancies of learned Brahmins who spun out of their brains an ideal system of what ought to be the law. A careful perusal of our law books, more especially the commentaries and the *Nibandas* or Digests which were made from time to time, shows that they record the practices current from time to time : they further point to a continuous growth of the original and fundamental ideas.

Materials are wanting to trace the said growth to the early Vedic times, and for our purposes it is scarcely necessary to do so. Starting with one of our later *Smrithis*, that of NARADA, a work of about the fifth century A. D., as we now have it, we find side by side with the joint family consisting of males and females owning property with the father as the head, individual rights of properties recognised. The autocrat is gone but the sons are not entitled to demand a partition during the lifetime of the father, and he can separate them at his choice.[1] Coming to the later times, the period of the *Mitakshara* at about the 11th or 12th century, individualism is still more prominent, the rights of individual members in the family are emphatically laid down, and the father has no higher rights than the son.[2] The son is entitled to demand a partition though the father be unwilling, and the shares are absolutely equal.[3] The father is not entitled

* Address delivered by Mr. K. Srinivasa Aiyangar of the Madras Bar, at the Annual Vakils Gathering in Madras on 29th, April, 1910.

1. Narada Ch. XIII, Ss. 2-3.

2. Mit. Ch. I, S. 2 pl. 27.

3. Mit. Ch. I, S. 2, pl. 5-6 ; S. 3 pl. 7 and S. 5.

to make an alienation of the family immoveables any more than the sons. The female members are maintained out of the family property, and the daughters of the family married out of the family property. If there is a division, shares are allotted to the mother[1] and the daughter.[2] As yet we find no mention of the exercise by individual members of one of the rights of ownership, namely, the power of alienation. Instead, the prohibition of transfer by individual members of family property, which originated at a time when individual rights were not recognised, is repeated. But the right is there in the power of every member to become separate at his choice. The separated members can dispose of their property by gift or sale, and the prohibition against alienation by separated and unseparated members is explained away.

There is no material change in the rules of succession. VIGNANESWARA took a good deal of trouble to dissociate religion from the idea of property, and held property to be temporal[3] and propinquity or nearness of relationship as the sole test of priority in succession. Some public men who cry out "religion in danger" at the least sign of progress may as well note the fact.

The agnatic exclusiveness of the joint family is still strong, but the widow's right to succeed, which was the subject of dispute, is definitely settled in her favour, and she succeeds to the separate property of her husband. A learned writer on Hindu Law is of opinion that the widow was according to the *Smrithis*, entitled to take the place of her husband in the family and had the rights of her husband in the joint family properties. In such a case, of course, there could be no power of alienation, as her husband himself could have none, and the prohibition of alienation laid down in the old *Smrithis* would seem to apply to such a case, and the author of the *Smrithi Chandrika* lays down the same rule. There is no trace of any doctrine of reverter and no limitations of the estate taken by the widow; on the other hand it is treated as *Stridhanam*. The limited estate of the widow and the other female heirs and the consequent doctrine of reverter are modern developments of our Courts based on the Bengal system of JUMITAVAHANA. I might mention here that we, on this side, have grown out of the habit of giving a share to the mother[4] and daughter at a division, and our Courts have practically abolished the power of the father to make any

1. Mit. Ch. I, S. 2 pl. 8, 9.
2. Mit. Ch. I, S. 7.
3. Mit. Ch. I, S. 1 pl. 9.
4. Smrit. Ch. IV, Ss. 8-17; 6 M. 136.

gifts—even gifts of affection on a strict adherence to the theory of equal rights of father and sons. On the other hand, by a remarkable extension of the so-called pious obligation of the sons to pay their father's debts, the father is enabled to waste the whole family property if he choses. The *Mitakshara* became the leading authority in all India and continues to be the leading authority, except in Bengal, and it is reasonable to infer that the rules of law laid down by the *Mitakshara* were in conformity with the practice of those times and were acceptable to the Hindus throughout India.

The next stage in the evolution is seen in the *Dayabagha*, Though the theories of the author may not be in conformity with the doctrines of the *Mitakshara*, the rules laid down in the former are merely the logical development of the legal ideas of the time of *Mitakshara*. The proprietory right of the individual member is more fully recognised, and, instead of the family holding the property, the property is held by a collection of individuals, each being entitled to deal with his interest according to his pleasure.[1] The position of the father as settled by the Courts of Bengal, based on the theory of *factum valet*, of which, by the way, JUMITAVAHANA was quite innocent, is no doubt very different from that of the father of the Mitakshara family. But I am afraid JIMUTAVAHANA would be quite surprised to learn that the father was the absolute master of the ancestral property. JUMITAVAHANA is, no doubt, quite emphatic in laying down that sons have no right by birth[2] but he is equally emphatic in laying down that the father is not the absolute master of the ancestral wealth. He has the same duties as a Mitakshara father and if he chooses to divide he cannot make an unequal division and can at the best retain only two shares for himself. This position is the necessary and logical outcome of the power of the individual members to become divided at their choice and at one time the Madras High Court recognized the power of individual members to dispose of their interest in the family property even by way of gift or by Will.[3] This position was soon abandoned and we have not yet solved the many puzzling problems arising out of an unnecessary equity in favour of purchasers for value. An individual may easily be presumed to have exercised his choice of becoming divided, if he alienates his share in the family property. It is difficult to understand why when a

1. Daya Ch. I, Ss. 8-9, 35.
2. Day. Ch. I, Ss. 11-31.
3. *Venkatapathy* v. *Lutchmee* 6 M. Jur. 215.

member of a joint family brings a suit for partition (as emphatic a declaration of his choice as one can have) he should be deemed to be undivided until a Court chooses to divide the properties and why the other members should benefit by their own wrong if he dies in the meantime. Perhaps it is not even yet too late for our Courts to retrace their steps.

It is more difficult to trace the continuity of legal ideas in the matter of inheritance from Mitakshara to Dayabagha and the difficulty appears insuperable when you find the theory of religious efficacy made the basis of the law of succession in the latter. But looking beneath the surface, it is not difficult to see that the fudamental conception of the nearness of kinship as the basis of preference in matters of succession holds good even in the Dayabagha. There is a difference, as would be expected, in the idea of nearness. At a time when agnatic exclusiveness was strong, when property was considered the property of the family the preference of agnatic relations to the nearer cognates is intelligible. When once the joint family became moribund, when individual rights of property and free disposal thereof are fully recognized, the ideas of nearness change and the sentiment of the community awards the property to the nearer cognate in preference to the distant agnates, and this is what seems to have taken place. The author of the Dayabagha is in touch with the sentiment and cognizant of the practice of the community, but, fettered by the letter of the law, managed to effect a reconciliation by importing his theory of religious efficacy. He, however, does not seem to be quite happy about it and says "whether you agree with my theory or not my order of succession is the law."[1] The order of succession according to the doctrine of spiritual benefit strictly carried out would be found at variance with the order of succession expressly mentioned by him. Except to the extent of including some near cognates it does not appear that JUMITAVAHANA lays down any very different order of succession. The succession of kindred, especially among the Bandhus both under the Mitakshara and the Dayabagha, has always been a matter of difficulty and different lines and orders of succession have been suggested by different writers on the construction of the various texts. As is to be expected, there is not much difficulty in the case of succession of near relatives which is one of common occurrence. Problems as to priority even among near relations are not yet

1. Daya Ch, II, S. 11, pl. 33.

rare and the Madras High Court had recently to decide between the claims of the mother's sister's son and mother's brother's son. See *Appandi Vathiyar* v. *Bagubali Mudaliar.*[1]

The doctrine of the Dayabagha that females succeeding to a male's property have only limited estates, our Courts have unfortunately introduced into the Mitakshara system, and our Courts are daily investigating into the necessity of alienations at the instance of persons of whose existence the deceased had no notion. Not being content with this we have the same doctrine of reverter introduced in the succession to Stridhanam property also.

With the full growth of individual rights of property and the consequent recognition of the rights of transfer by way of gift, sale or otherwise, the recognition of a power of disposition by will was only a question of time and such power has been established for more than half a century. When the power of the individual to dispose of his property in any manner he likes is fully established, public policy interposes a check to prevent the creation of perpetuities by the creation of future estates in favour of unborn persons or by the prevention of alienation imposed by the will of the individual owner.

Though the Privy Council in *Togore* v. *Tagore*[2] has settled the limitations of the power of alienation by the Hindus it may not be irrelevent to enquire whether the limitations are in conformity with the spirit of Hindu Law. Some learned writers refer to the well known text preventing alienation of immoveables as proving that perpetuities are not repugnant to the Hindu Law and contend that the limitations imposed by the Privy Council are unnecessarily strict and not in accordance with the Hindu Law. But it must be remembered that the text is of a time when the right of alienation itself was not recognized while the law of perpetuity comes in as an exception to the recognized right of unrestricted alienation. At the same time the reason given in the text for the prohibition of alienation is one of the strongest motives for the tying up of the properties for the benefit of future generations. A nearer analogy may probably be found in the power of adoption and the limit of time within which such power might be exercised.

The provisions of the Transfer of Property Act[3] and the Indian Succession Act on this matter may usefully be extended to gifts and wills by Hindus and such an extension would

1. (1910) 20 M.L. J. R. 275. 2. (1872) 9 B. L. R. 377.
3. Ss. 13 and 14.

certainly not be against the spirit or the letter of the Hindu Law.

There is only one other matter to which I wish to refer, *i.e.*, the payment of the debts of the members of a joint Hindu family out of their interest in the joint family property. The present state of the law as settled by our Courts [1] is anomalous and illogical and proceeds on a wrong view of the rights of the members of co-parcenary in the family property.

The express texts of the Hindu Law directing payment of the debts of a deceased by those who succeed to his property[2] don't make any distinction between the interest of a member in joint family property and any other kind of property, and the definition and explanation of the Mitakshara commentary of the word 'Riktha'[3] distinctly shows the existence of the obligation, though the property may be an interest in joint family property and though the succession may be by survivorship.

While our Courts in their anxiety to enforce the so called pions obligation of the sons to pay their father's debts have gone too far in practically despoiling the sons of their interest in the property, they have scarcely done justice to the creditors of the other members of the family. The rights of the father's creditors to sweep away the whole of the family property have been to some extent moderated in a recent decision of the Bombay High Court [4] on a correct interpretation of the word "Avyavahara" which has hitherto been loosely translated as 'illegal and immoral,' and the Madras High Court [5] still tenaciously holds to the theory of an antecedent debt as some sort of protection to the sons.

A careful study of the original texts and their proper interpretation in accordance with the 'Mimanisa' rules would have avoided several anomalies and hardships as they now exist not only on the subject of the payment of debts but also on the several other questions above indicated.

---

1. See *Ramanayya* v. *Rangappayya* (1893) I. L. R. 17. M. 144 and *Ramasawmi* v. *Veerappa* (1910) 20 M L. J. 309

2. See Chapter relating to action for re recovery of debts.

3. [A distinction is drawn between Riktha and Samvibhaga The former is said to be un-obstructed heritage and the latter obstructed heritage. Mit Ch. 1, S. 1 pl. 13. Riktha cannot, therefore, be said to be co-extensive with joint family property. It is property in which a person has a right by birth. Can the share taken by a co-parcener other than a son, grandson and great-grandson by survivorship be said to be Riktha ? :—ED.]

4. *Durbar Khachar* v. *Khachar Hasrur* (1908) I. L. R. 32 B. 348.

5. *Venkataramanaya* v. *Venkataramana Doss* (1905) I. L. R. 29 M. 200.

NOTES OF INDIAN CASES.

Shiam Lal v. Ram Piari :—I.L.R. 32 A. 25.—A person purchasing property from a minor pays off a mortgage properly charged on that property. His title under the purchase failing, is he entitled to subrogation in respect of the mortgage paid off by him? *Banerji* J. and on L. P. Appeal Sir *George Knox* A. C. J. and *Richards* J. answer this question in the negative.

It is to be regretted that the learned Judges who heard the appeal under the Letters Patent have not thought fit to give any reasons for their decision. Their statement that the judgment (appealed from) of *Banerji* J. was "in accordance with the law as understood in these provinces" must refer to the law in India generally and not particularly to the United Provinces, for neither in the judgment nor in the argument is any reference made to any decision and much less to any course of decisions of the Allahabad High Court. Possibly the learned judges intended by that remark to express their unwillingness to follow the principle of the American authorities to which their attention was invited. If that were so, we think it right to say that with reference to questions like the one raised in this case, where the decision rests on principles of general equity, there is little reason why the principles of equity followed in America should be less applicable here than the rules obtaining in England. On the other hand, in an analogous case, the Judicial Committee refused to apply in India the principles of the English law (see *Gokaldas* v. *Puranmal* [1]). And there is even less reason here for ignoring principles well established in America, when there is no English precedent to the contrary. And what, with all deference, strikes us as rather strange in this case is that there is no reference either in the judgment of *Banerji* J. or in that of the appellate bench to *Thurston* v. *Nottingham Permanent Benefit Building Society* [2] though it appears to have been dwelt on in the course of the argument.

Dealing with the question first on principle, it seems to us to be unduly narrowing the scope of the doctrine of "equitable subrogation" (as distinguished from "conventional" subrogation) to have denied the right in the case under notice. The decision

1. (1884) I. L. R. 10 C. 1035. 2. (1902) 1 Ch. 1, 1903 A. C. 6.

proceeds on the footing that as the sale by the minor conveyed no right, the purchaser when paying off the mortgage had no interest of his own to protect and was therefore a *volunteer*. It does not appear from the report whether at the time he paid off the mortgage he knew that his vendor was a minor. But even if it were so, it seems to us that would be immaterial; for a mistake of law, on the part of the purchaser, as to the invalidity of the sale is not inconsistent with his *bona fide* believing that he had an interest in the property (cf. *Durgozi Row* v. *Fakir Saheb*[1]; *Maniklal* v. *Manchershi*[2]). And the true test for determining whether or not a person makes a payment as a volunteer is not whether in fact he has an interest in the property, but whether at the time of making the payment he *bona fide* believes that he has an interest in the property. (See SHELDON on *Subrogation*. S. 36 (*a*).) After all, the payment has benefitted the real owner and the law imposes this further restriction as to the payment not being voluntary, only to prevent the officious intervention of a stranger. The principle suggested by Mr. Sheldon is in accordance with that acted upon in this country in several cases where the claim was made under Ss. 69 and 70 of the Contract Act (cf. *Bindubhashini Dassi* v. *Harendra Lal Roy*, [3]; *Radha Madhub* v. *Sasti Ram Sen* [4]). And if this be the true principle, it seems to us immaterial whether or not the purchaser under the void sale has taken possession, though in *Chama Swami* v. *Padala Anandu*[5] reference is made to that circumstance also.

In the American case of *Spaulding* v. *Harvey* [6], cited before the appellate bench, it was also pointed out that the doctrine of subrogation does not depend upon or grow out of the ability of the parties to make valid contracts, for it is not founded upon contract, express or implied, but upon principles of equity and justice intended to afford protection to a meritorious creditor.

Far from there being anything in the English law opposed to the view above set forth, we venture to think that the same derives considerable support from the decision both of the Court

1. (1906) I. L. R. 30 M. 197.
2. (1876) I L. R. 1 B. at pp. 280 5
3. (1897) I. L. R. 25 C. 305.
4. (1899) I. L. R. 26 C. 826.
5. (1908) I. L. R. 31 M. 439.
6. (1891) 13 L. R. A. 619.

of Appeal and of the House of Lords in *Thurston* v. *Nottingham Permanent B. B. Society* [1]. In that case the society acted as an agent of one of its members who was a minor in negotiating a purchase of property for her, paid the purchase money and took a mortgage from her of the property for the amount of the purchase money and other sums expended on her behalf. The mortgage and the loan were as such held to be not binding on the minor, but the Courts affirmed " the subrogated right of the society to be repaid the money which they, standing in the shoes of the vendor, have a right to claim as a lien upon the property conveyed" (per Lord *Halsbury* L. C). That this right was recognised not in virtue of the *agency* (cf. S. 221 of the Contract Act) is clear from the following passage in the judgment of *Vaughan Williams* L. J :—" I thought during the argument that the only security which the building society held for the £250 which they had paid for purchase money was a lien upon and a right to retain the title-deeds and conveyance until the money had been repaid ; but I am satisfied now, having discussed the matter with my brethren, that the society, having paid off the vendor, have a right to the remedies of the vendor—have a right, that is, to enforce the vendor's lien." The reliance placed by *Cozens-Hardey* L. J. on the analogy of a mortgagee under a *forged* mortgage-deed paying off a prior mortgage (*Brocklesby* v. *Temperance Permanent Building Soeiety* [2]) or a vendor's lien also supports the view herein submitted.

In the case now under notice, the mortgage seems to have been paid off at the request of the vendor and it may not be irrelevant here to draw attention to the extent to which, in certain classes of cases, Courts of Equity in England are willing to go to help a creditor whose loan is not legally binding on the borrower, but has nevertheless been applied to pay off proper debts. In one of these cases Lord *Selborne* L. C. said: " It is consistent with the general principle of equity that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as in substance to make those other people pay their debts. I take that to be a principle sufficiently sound in equity—" *Black-*

1. (1902) 1 Ch. 1 and 1903 A. C. 6. 2. (1895) A. C. 173 at p. 182.

burn Building Society v. *Cunliffe Brooks & Co.* [1]; cf. also on appeal per Lord *Blackburn* in 9 A.C. at p. 866; *Baroness Wenlock* v. The *River Dee. Co.*, [2]. With a view to the furtherance of justice, equity implies a fictitious assignment of the claim of the original creditor in favour of the person with whose money he is paid off.

Shib Shankar Lal *v.* Soni Ram.—I. L. R, 32 A. 33.-In this case two learned Judges of the Allahabad High Court (*Banerji* and *Tudball* J. J.) have held that an acknowledgment by a female holding a limited estate will not give a new starting point for limitation as against the reversioners. It is rather srtange that this question has not so long come up for judicial consideration. At any rate, there is no reported decision or even any considered *dictum* upon the point and we feel very great hesitation in accepting the view which has commended itself to the learned judges.

At the outset and in form, the question is, of course, one of construction, depending on the language of S. 19 of the Limitation Act of 1877, which requires that the acknowledgment should be signed by the party against whom such property or right is claimed or by some person through whom he derives title or liability.' But the real question is one of substantive law: *viz.*, whether the reversioner can be said to derive his liability *through* the intervening female. On this point we are not satisfied that the analogy of the rule as to *res judicata* can be lightly brushed aside. The relation of the widow (in whom the estate is vested) to the reversioners is very different from that subsisting between the reversioners *inter se*, and cases like *Bhagwanta v. Sukhi*[3] are therefore not in point.

It has sometimes been said that the principle laid down by the *Sivaganga case* rests not on the language of the Code, but on the *general principles* of *res judicata*; but it should suffice for the present purpose to point out that the doctrine of that case is rested on the ground of 'privity' between the female owner and the reversioner (see *Partab Narain* v. *Trilokinath*[4]) and this rule of privity, it is submitted, is enough to satisfy S. 19 of the Limitation Act as well. We may also point out that

1. (1882) L. R. 22 Ch. D. at. p. 71.
2. (1887) L. R. 19 Q. B. D. 155.
3. (1899) I. L. R. 22 A. 33.
4. (1885) I. L. R. 11 C. 186 (P. C.)

the word 'through' used in the section is more indicative of *transmission* of liability than of the root of liability and there is no reason why the female in whom the *whole estate* is vested should not be regarded as 'transmitting' the liabilities of the estate on her death to the reversioner—cf. *Srinivasa* v. *Dandayudapani.*[1] It is important to remember that, subject to his right to impeach acts of the female owner, the reversioner takes the estate as it is *at the female's death.* The widow can incur new debts in certain circumstances, so as to bind the estate in the hands of the reversioners; she can, out of the *corpus* pay even barred debts of her husband; the law imposes no obligation upon her to pay the debts *out of her income.* Why should she not keep the debts alive, so as to bind the reversioners

The learned Judges seek to explain away the rule of *res judicata* by suggesting that a decision obtained by or against a woman, representing an estate, in some way inheres in the estate and descends as part of it. We find it difficult to follow this reasoning. The doctrine of *res judicata* is not part of the law of *property*, but a rule of procedure based on the principle of *estoppel* and its application involves the recognition of a relationship of privity between the persons concerned. An acknowledgment by a widow, for instance, of a debt due by her husband makes the debt enforceable *against the estate* even at the moment of her death. If the liability is at that time part of the *estate*, it is difficult to conceive any principle on which the estate is to be relieved of it the moment it descends on the reversioner. Suppose a suit has been brought in time (apart from any acknowledgment) against the widow, but she dies pending the suit, will not the reversioner be liable to be proceeded against, even though a fresh suit against him may be out of time? If so, on what principle is such liability to be placed? Surely it won't be suggested that the creditor should on pain of finding himself barred implead the reversioner also, even during the life-time of the widow.

In deciding the question (which as stated above is not merely one of *construction*) considerations of justice or policy are not out of place; and the reasoning of some of the English and

---

1 (1889) I. L. R. 12 M. 411.

Irish cases, as to the effect of acknowledgments and part payments by tenants for life, is not without application here, though the decisions turned partly on somewhat different language to be found in the English statutes. These statutes referred to acknowledgments and part payments by the person *by whom the debt etc., was payable*, but they made no provision as to what the effect on the remainderman would be, of an acknowledgment or part payment by a tenant for life. The question was decided on general principles, 'on a consideration of the position and duty of a tenant for life' (see case cited *infra*): and in one of the cases, the Court said. The right principle to adopt is that so far as the real estate is concerned there is no one else but the tenant for life to pay the interest; that in making such payment he represents the whole estate; that the payment is an admission of the liability to the debt * * It is sufficient evidence of a continuance of the testator's contract to pay the debt * * (per *Chitty* J. in *In re Hollingshead*;[1] as to the effect of acknowledgment, see the Irish cases cited in LIGHTWOOD'S *Time Limit on Actions*, p. 337). The Hindu widow *represents* the estate in a truer sense; and an acknowledgment by her may oftentimes be not only a prudent act, but the only means of saving the estate from being sold up by the creditors.

It may also be pointed out that under the Acts of 1859 and 1871, the language of the section dealing with acknowledgment closely resembled that of the provisions of the English statutes. The words 'by the party to be charged therewith' in S. 20 of the Act of 1871, seem to have been changed into the words 'by the party against whom such property or right is claimed or by some person through whom he derives title or liability' (in the Acts of 1877 and 1908) not on account of any intention to change the underlying principle but only with a view to make the language appropriate to the extended scope of the section, which henceforth applied not only to 'debts and legacies' but to all claims in respect of any property or right.

Lalta Prasad *v.* Babu Prasad.—I. L. R. 32 A. 51.—The question of the applicability of the law of limitation to claims against receivers has received little attention in this country. In the case under notice the learned Judges hold that a

1. (1888) L. R. 37 Ch. D. pp. 659, 660.

claim preferred to the receiver in time should not be disallowed merely because time has expired when the Court comes to adjudicate upon it. The action, being one to wind up a partnership, resembled proceedings in administration or in bankruptcy, as to which the practice has been to allow the creditor to come in and recover so long as there are any funds in Court *Harrison* v. *Kirk*;[1] *Re Dennis* [2] provided that he was not already barred at the date of the judgment for administration, &c. Where the Court is not administering a fund, the question is one of greater difficulty (cf. *Lancaster* v. *Evors*, [3] where the question is left open). Of course all moneys which come into the hands of a receiver are moneys belonging to the Court (*De Winton* v. *Mayor &c. of Brecon*[4] and the Court may direct him to pay any claims preferred by the creditors of the estate. In such a case no question of limitation would arise, if the claimant was not barred at the date when he preferred his claim. But the Court which appointed the receiver is not bound to order him to pay a creditor. It may merely give leave to the creditor to sue the receiver. In that case, if by the time leave is granted time had expired, there is no provision or principle in the Limitation Act which would save the action when brought from being barred. The institution of the suit is within the language of S. 4 of the Limitation Act; and it cannot be treated as a 'reference' to the Court by the authority granting leave (Cf. *The Regulation Collector of the Uthumalai Estate* v. *Subbier* [5].) The Receiver may, if the Court which appointed him thinks fit, be restrained from setting up the plea of limitation (Cf. *Smith* v. *Earl of Effingham* [6].) But it is doubtful if even such an order would justify the Court in which the suit is brought in ignoring the mandatory language of S. 4 of the Limitation Act.

SUMMARY OF ENGLISH CASES.

Dendy v. Evans. [1910] 1 K B. 263. (C. A.)

Landlord and tenant—Forfeiture—Relief against-Right to rent from sub-lessee.

The fact that the lessor sued to recover possession from his lessee relying upon a forfeiture is no ground for a sub-lessee to

1. (1904) A. C. 1.
2. (1895) 2 Q.B.630.
3. (1846) 10 Beav. 154.
4. (1860) 28 Beav. 200.
5. (1908) I. L. R. 31 M.495.
6. (1844) 7 Beav 337.

refuse to pay his lessor the rent due on the under-lease subsequent to the suit of the original lessor, if in fact the forfeiture was relieved against at the instance of the head-lessee.

Per *Curiam*—There is no foundation for the proposition "that the issue of the writ for possession by the lessor was an irrevocable election by him to treat the lease as void and not only so but that it made the lease void and necessarily put an end to the under-lease also."

The Governors of St. Thomas Hospital *v.* Richardson.
[1910] 1 K. B. 271. (C. A.).

Landlord and tenant—Trustee for tenant—Bankruptcy of trustee—Arrears of rent before bankruptcy—Right to indemnity of trustee—Whether lease vests in trustee in bankruptcy of the trustee.

If the trustee of a tenant, who has arrears of rent to pay, becomes at that time a bankrupt, the legal estate in the leasehold and the right to possession thereof vest in his trustee in bankruptcy, as he has a lien on the lease-hold for his indemnity in respect of the arrears for which he is liable ; (though if he has no right of lien, property held on trust will not pass to the trustee in bankruptcy) so that if the trustee in bankruptcy assigns the leasehold interest to the bankrupt the liability to pay the arrears to the lessors revives and the bankruptcy cannot be a defence to the action for arrears of rent.

Weiner *v.* Harris. [1910] 1 K.B. 285. (C.A.)

Factor—Factors' Act, 1889 (52 & 53 *Vict. C.* 45) *Ss.* 1 *and* 2 *Goods on 'sale or return'—Authority to pledge—Construction of deeds—Rule for.*

When goods are given to an ordinary person for '*sale or return*' the meaning of these words is that *he* is either to buy them or return them. But when they are given to a selling agent for 'sale or return' the meaning is that he must sell to *others* or return, but not *himself* buy them.

The plaintiff, a jeweller, gave certain jewels to *B*, a retail jeweller on *B* giving him a letter to the following effect. " I acknowledge receipt of the jewels, they are your property and

remain so until sold or paid for, they being left with me for the purpose of sale or return, and not to be kept as my stock; my remuneration for selling them is agreed at one-half the profit." On *B* pledging the jewels with the defendant without express authority from the plaintiff. *Held*, that plaintiff cannot recover the jewels, that the letter constituted *B* his agent, that under Ss. 1 and 2 of the Factors Act, agents had authority to pledge, and that even the express covenant contained in the letter that the jewels are to be the property of the plaintiff did not deprive *B* of his right to pledge under the Act, as an agent.

Per *Curiam*—The Court looks at the real nature of a transaction and not tothe form of the words creating it. If really it is not a case of ordinarv 'sale or return' but handing over to a selling agent, even if the parties style the transaction as one 'for sale or return' and provide that the goods should be the property of the owner until sold or returned the real character of agency and the agent's right to pledge cannot be avoided. "It is quite plain that by the mere use of a well knwon legal phrase you cannot coustitue a transaction that which you attempt to describe by that phrase. It is not in the least conclusive that the parties have used a term or language intended to indicate that the transaction is not what in law it is."

Foley's Charity Trustees *v.* Dudley Corporation.

[1910] 1 K.B. 317 (C.A.)

Highway—Payment of rent charge to others for 100 *years—Presumption of legal origin—Liability of highway authorities to pay rent—Vesting of highway—What is.*

If the authorities of a highway have been for over 100 years paying a rent charge to the trustees of a charity it is the duty of the Court to presume anything which is possible to give that rent-charge a legal origin. It is certainly possible that the owners of this piece of land sold it subject to this rent-charge. Though the present authorities of the highway may not be universal successors of the previous authoriti es yet, inas much as they are in possession of the highway they are liable for the rent-charge. The road authorities have a property in and possession of the surface of the road, and of and in an undefined section of the air above, so far in each case as is necessary for

the discharge of their duties * * The road authorities may maintain an action of trespass as well as an action of nuisance * * The road authorities have a determinable statutory fee simple in such portion of the soil as is vested in them at all. Crtainly it is not the interest of a termor; certainly it is not the interest of a mere bailiff.

The surface of the street and so much of the actual soil of the road as may be necessary for its preservation as a road are vested in the local authority *i.e.*, so much as is necessary to support the surface as a road * * It is a fee simple subject to this that if the road be properly and legally abandoned and cease to be a highway, then the freehold will revert to some other person.

In re **Enoch and Zaretky Boek & Co's Arbitration.**

[1910] I. K. B. 327 (C. A.)

Arbitrator—Misconduct—Right to call witnesses without parties' consent.

Neither a Judge nor any person in a judicial position, such as an arbitrator, has any power himself to call witnesses to fact without the consent or against the will of either of the parties. Whether a Judge has power or not to call any body himself as a witness and examine him in the presence of parties, when neither of the parties objects to such a course, such witness, when examined, does not become the witness of either side in the sense that either side becomes responsible for his personal credibility. It is misconduct in an arbitrator to demand any payment for the work he does in connection with the arbitration. It is equally a misconduct for an arbitrator himself to procure evidence in the case.

The King *v.* Porter. [1910] 1. K. B. 369 (C. Cr. A.)

Contract to indemnify accused's sureties—Illegality of.

A contract by an accused person with his sureties for his bail to indemnify them against losses by suretyship, is not only unenforceable, but is also illegal as tending to produce a public mischief in that the offenders will be tempted to abscond and not easily brought to book. Persons entering into such a contract are guilty of the offence of conspiracy,

---

Clissold v. Crutchley. [1910] I. K. B. 374.

Attachment by order of Court—When trespass.

A solicitor, who had a London office as well as a branch office in the country, attached, at the instance of a client, certain goods of a judgment-debtor of the client in execution of a decree without knowing that the judgment-debtor had about two days pervious to that paid the judgment-debt in the country office. *Held* that the attachment under the circumstances did not amount to trespass, as there was a valid order for attchment in consequence of a regular judgment.

In re **African Association, Ltd., and Allen.**
[1910] I. K. B. 396.

Contract of service—Right to determine.

An agreement made in England to work as a clerk or trade assistant in Africa on £ 250 a year, for two years, provided that the "employers may at any time at their absolute discretion terminate the engagement at any earlier date than two years if they may desire to do so." *Held* : though the employers had a right to terminate the contract before two years still, as there was no express power therein to dispense with the services summarily in the absence of misconduct, the employers could not terminate the contract without reasonable notice usually required to be given in such cases.

Thorman v. Dowgate S. S. Coy., Ltd. [1910] I. K. B. 410.

Ejusdem generis—Rule of—Use of.

The rule of *ejusdem generis* is only a rule of construction, whose object being to find the intention of the parties, it is only subordinate to that (intention) and does not control it, that is to say that the canon of construction is but the instrument for getting at the meaning of the parties, and that the parties, if they use language intimating such intention, may exclude the operation of this or any other canon of construction. It is not necessary for the application of the rule that the words used must fall into one genus or category. There is no reason why either the nature of the instrument or the language used might not cause the gene ral words to be referred to the specific words

either collectively or in groups or individually according to the intention of the parties.

Nottidge v. Dering. [1910] I. Ch. 297 (C. A.)

Assurances—Covenants for title—Construction—Not so as to confer larger estate than that expressly given.

Covenants for title are really ancillary to the assurance of property and ought not, in the absence of clear words, to be extended so as to confer a larger estate than is expressly assured, and, still more, ought not to be so construed as to enable the grantee to claim property as free of charges or incumbrances to which, in the operative part of the deed, it is expressly made subject.

In re **Discoverers Finance Corporation, Limited: Lindlar's Case.** [1910] 1 Ch. 312.

Companies Act—Shareholder's right to transfer—"Bona-fide transferor"—Transfer for the purpose of escaping liability.

Under the Companies Act, in the absence of restrictions in the articles, the shareholder has, by virtue of the statute, the right to transfer his shares without the consent of any body to any transferee, even though he be a man of straw, provided it is *a bona fide* transaction in the sense that it is an out and out disposal of the property without retaining any interest in the shares, *i.e.*, that the tranferor *bona fide* divests himself of all benefit. Even if the transfer be executed for the express purpose of relieving the transferor from liability, the directors cannot, upon that ground, refuse to register it unless there is in the articles some provision so enabling them. The rule under the common law was not different. The fact that as a part of the bargain there exists between the transferor and transferee an obligation in the transferor to indemnify the transferee, does not render the transferor liable. In cases where the articles contain a clause empowering the directors to reject a transferee whom they do not approve, the principle is that the transferor cannot escape liability if he has actively by falsehood or passively by concealment induced the directors to pass and register a transfer which if he had not so deceived or concealed, they would have refused to register. Whether there has been such misrepresentation is a question of fact ; but it is

not sufficient to show that the transferee's address was incorrect or that the description of his occupation was inaccurate or the like. The Court must arrive at the conclusion that therefrom resulted such a state of things as that if the directors had known the truth they would not have registered the transfer. In either case if the transferor has obtained the advantage of registering the transfer to a man of straw upon an opportunity obtained by him fraudulently or in breach of some duty which he owed the corporation, he will continue liable notwithstanding such transfer.

Measures Brothers, Limited v. Measures.
[1910] 1 Ch. 336.

Master and Servant—Using information gained when in service— Winding up order—Wrongful dismissal.

No man who is in the employment of another is entitled to use or even take a copy, for his own private purposes, of any document of his employer which comes to his hands or to which he has access in the course of his employment. It was accordingly held not open to a director of a company to make use of a copy of the list of customers of the company in order to solicit orders from them, and the man was directed to restore the lists to the company. From the nature of the case, however, an injunction restraining him from using the information cannot issue. The winding up order of a Company operates on the wrongful dismissal of any servant who undertakes to work a term at a fixed salary and he is not bound by any restrictive convenant in the contract of service that he should not practise a similar trade or calling after the termination of his service with the Company.

Attorney General v. Walthamstow Urban District Council: [1910] 1 Ch. 347.

Injunction—Statutory liability—Direction not to levy any charge for admission—In the absence of provision to that effect, not liable for lessee's acts.

The Baths and Washhouses Act, 1899, empowered the Commissioners appointed under the Act to let public baths when they were closed to the public for music or dancing; the Act also providing that no money was to be charged at the doors. The Commissioners, while letting the baths, expressly stipulated that

no money was to be charged at the doors. Notwithstanding this clause, the lessees took money on admission. *Held*: the Commissioners were not responsible for the acts of the lessees and no injunction could issue against them so long as they did not authorise or set up the right to authorise the taking of money.

British South Africa Company v. De Beers Consolidated Mines, Ld. [1910] 1 Ch. 354.

Contract—Law that is to govern—Intention—Factors in determining clog on equity of redemption—Chartered Company—Nature and powers of—Ultra vires.

In cases where a contract is not immoral nor contrary to public policy, a solution of the question by what law the contract is to be governed is arrived at when it has been ascertained by what law the contracting parties intended it to be governed. It is open to the parties to stipulate in express terms that he law of a particular country shall apply. If there is no express stipulation the Court must arrive at a conclusion upon the materials before it as to the law with reference to which the parties contracted and that law is to be applied. *Prima facie* the *lex loci contractus* presumably governs the nature, the obligation and the interpretation of the contract, unless the contrary appears to be the express intention of the parties. If a provision of the contract would be valid or effective according to one law and invalid or inoperative according to another law, that is a factor in favour of the parties having intended it to be governed by the law according to which the contract is operative. Another factor is the fact that the contract relates to land situate abroad. Again, different laws may apply to different parts of a contract if the parties so intend. Applying these principles, *Swinfen Eady* J. *held* that a contract between the South African Company and De Beers Consolidated Mines under which the latter agreed to advance to the former a certain sum of money in return for which the latter was to have floating debentures on the Company's assets, and the exclusive license to mine in the Company's territories in perpetuity, was intended to be governed by English law and that portion of the contract which related to the grant of exclusive license which was to

continue after the duration of the debentures was bad as offending the rule against the clog on equity of redemption. The circumstances upon which the learned Judge relied were: (i) That the contract was sealed in England. (ii) The interest as well as the principal amount was payable in England. (iii) That the English law was applicable in part of the Company's territories to which the contract related though in another part the Roman-Dutch law prevailed which did not recognise the rule of clog on the equity of redemption. (iv) The assurance was of a nature well known to English law and regulated by statutes.

It was also held in this case that unlike a Statutory Company whose capacity is determined by the statute creating it, a Chartered Company could bind itself to all things to which a natural person could bind himself and if the Company does some act which it is forbidden to do by the charter, though that may be a ground for the cancellation of the charter, if the Crown take no such steps, it does not lie in the mouth either of the corporation or of the person who has contracted with it, to say that the contract into which they have entered was void as beyond the capacity of the corporation. It was further held in this case that the grant of an exclusive license to work diamond mines in the Company's territories in the exercise of proprietary right is not a grant of a monopoly of trade.

Evans v. **Levy**. [1910] 1 Ch. 452.

Landlord and tenant—License to assign—" Unreasonable condition "—Costs.

A clause in a lease was that the lease was not be assigned without a license from the landlord (but the license was not to be withheld arbitrarily). The lessee wanted to assign the lease to his wife and applied for license. The lessor refused to give license except on condition that the lessee executed a covenant for himself, his administrators and executors, to perform all the conditions and covenants in the lease for the rest of the term.

Held: that the condition sought to be imposed was altogether unreasonable, the utmost that the lessors would be entitled being a covenant on the part of the transferor as a surety for his wife and that therefore the lessee was at liberty to assign without his

consent; there being no express covenant by the lessor to consent, the lessee had no cause of action against the lessor and therefore was not entitled to any costs against him.

Grundy v. Briggs. [1910] 1 Ch. 444.

Qualification for Directorship—Joint holding of shares as executor—Transfer—Refusal to register.

Plaintiff was one of the executors of an estate consisting among other things, of certain shares in a Company. On production of the probate, the Company registered him as a transferee jointl with the other executors. The articles of association required that each director should be the registered holder of not less than 20 shares. *Held*: that the plaintiff had enough qualification to be a director.

But to be sure, the other executor also transferred the requisite number of shares to the sole name of the plaintiff but on the next day wrote to the Company revoking the signature to the transfer and notifying the Company not to register.

Held: that the Company would not be justified in gratuitously assuming that the transfer necessarily involved a breach of trust and in the absence of any specific reason for the withdrawal of the signature, in refusing indefinitely to register the transfer.

JOTTINGS AND CUTTINGS.

Law Reporting in Madras.—We are glad to learn that the Government of India have at last seen it their way to sanction an Assistant Law Reporter for the Madras High Court. Representations were made from time to time about the necessity of an increase in the Reporting Staff by the Madras Law Reporting Council to the Government of India, but until now to no useful purpose. The last recommendation made a few months ago was that two Assistant Reporters were at least neessary to cope with the work in Madras, especially having regard to the increase in the number of Judges and consequently of the Division Benches which would have to be attended to by the Reporter; but the Government of India, we are told, was pleased to sanction only one Assistant. The Calcutta High Court,

with its 13 Judges has 7 Reporters and 2 Editors, while the Bombay High Court, with its 7 Judges has 3 Reporters (of whom two are Vakils) and one Editor. But the Madras High Court, which had 6 Judges ever since July 1896, 7 Judges ever since November 1909 and 8 Judgesever since October last year had only a single Reporter till but a few weeks ago. Even in Allahabad there has been since last year two Reporters one of whom is a Vakil. We need hardly say that "Reporting" requires the constant attendance of the Reporters in Courts during the arguments of important cases, and we do not know how the Government of India thought that the demand of Madras in this respect was extravagant. We know, and it has been a matter of frequent complaint, that Madras is far behindhand in its Reporting. The reports have, for the last 5 or 6 years at any rate, never appeared punctually. It is no wonder that with such arrears the Reporting has not been efficient. We should have thought that under the new circumstances created by the addition of a permanent Judge to the High Court Bench, an addition of three or, at any rate, two to the Reporting Staff was absolutely necessary. We think that, as in the other places, the staff should consist of an Editor and three Reporters. There is no reason for making any distinction among the Reporters. We hope that proper representations will again be made to the Government of India of the utter inadequacy of the present arrangements.

***

The Assistant Law Reportership.—We cannot congratulate the Chief Justice on the selection he has made for the post recently sanctioned by the Government of India. Mr. J. Collier Adam, Barrister-at-Law, has been appointed to this post. We have already referred in these columns to the utter inefficiency that prevails in the system of Reporting in Madras, not to speak of the delay in the appearance of the Reports which must partly be ascribed to the staff being undermanned. Arguments were a rarity even during the days of the predecessors of the present Reporter and have almost ceased to appear now, and the head-notes are far from satisfactory. There is no discrimination in giving the facts of the cases reported,

We should have thought that the already existing Reporter being a Barrister, the selection for the new post would have been made from the Vakils about whose qualfications for the post there could be no denying, and we need hardly add that if a Vakil had been appointed he would have greatly contributed to the efficiency in the system of reporting and raised it to a higher tone. In Allahabad, there is one Vakil Reporter out of a staff of two Reporters and in Bombay there are two Vakils out of a staff of three, while in Calcutta there are also two Vakils. We are told as a reason for the appointment in Madras that a Barrister needs a greater help than a Vakil; but we can hardly think this to be a justifiable principle in the making of appointments. Almost all legal offices connected with the High Court are held by Barristers or by Attorneys. The Administrator-General is a Barrister. The offices of the Clerk of the Crown and the Official Assignee formerly held by Barristers are now held by Attorneys. The offices of Government Pleader and the Crown Prosecutor are held by Barristers. The new Office of the Secretary to the Rules Committee formed under the Civil Procedure Code is held by a Barrister. The Deputy Registrar, Appellate side, is a Barrister. The Deputy Registrar, Original Side, and the Assistant Registrar are Attorneys.

Except in respect of the office of the Administrator General there is no statutory enactment which compels appointment in respect of these offices to be made from among Barristers. No vakil has been appointed to any of these posts (except in the case of the Government Pleader) and it is but the height of injustice to exclude vakils from these appointments as they have been practically. We may note that out of 23 Barristers practising in Madras, 7 hold these and other offices. It need hardly be said that Vakils practising in the High Court outnumber the Barristers and Attorneys; and yet not a single one (not to speak of a *proportionate number*) of these offices is held by the Vakils. Under the High Courts Charter and Letters Patent, the Chief Justice has to be a Barrister and it is but natural for a Barrister Chief Judge to make appointments only from among Barristers. We think the qualification for a Chief Justiceship was introduced by a statute which is rather out of date

now and we do not see why a barrister alone should now hold this office. When the statute was framed the Bar in this country was only in the making and Barristers had to be imported from home for Judgeships and Chief Judgeships. Now that the Bar in this country has held its own, we think there is no necessity for the preservation of this qualification in the Statute Book.

***

The Advocate-General's speech at the Vakils' Gathering.—The Hon'ble the Advocate-General thanked the host of the evening, on behalf of himself and his brother-Vakils, in a very interesting speech, in the course of which he said that they had met again after the lapse of a year—a year that had not been uneventful to the profession; for one of the most prominent members of the Association, whose presence they missed that evening, had been elevated to the Bench. It used to be a long standing complaint that there were immense arrears in the High Court and that the High Court required to be strengthened by the addition of an energetic Judge. They had had their prayer granted, and it must be a matter of gratification to them all that the additional Judge had been chosen from the ranks of their profession. No more satisfactory appointment could have been made as it amply fulfilled the expectations and wishes of every one of them. It could no longer be put forward as a grievance that there were any arrears. It was not merely despatch of work with which they had reason to be gratified, but with the quality of the work. At one time he had heard it remarked by one of the Judges that no amount of addition to the strength of the High Court would have the effect of reducing the arrears and that the only remedy which could be thought of was to curtail the right of Second Appeal or to shut out the right of Criminal and Civil Revision. He (the speaker) had pointed out to that Judge that that would be an extreme remedy and need not be thought of till milder measures were first resorted to. Though they had had the experiment made of appointing a really capable and energetic Judge, the result had been their eighth Judge had succeeded in cutting down all the arrears of the High Court and he hoped the day

would soon come when no second appeal would be pending for more than a year and no first appeal for more than a year and a half. He was very moderate in his expectations and did not wish to entertain any very ambitious ideas, and he was sure that the day was not far distant when they might have that expectation realised. The year that had passed had also not been uneventful in other directions. All of them must feel gratified at the signs of a little intellectual activity in the ranks of the profession. They had had an addition to the legal periodicals in existence in Madras in the way of a weekly periodical, which gave much evidence of the energy and alertness of its Editor. They had also several very useful commentaries published during the year and they had very fair reason to be satisfied with the amount of intellectual stir that was taking place in the profession. Some of the commentaries published had been spoken of very highly. Then again, they had also an increase in the number of Courts and there were more opportunities now for the younger members of the Bar. He thought that it might be fairly said that Juniors had now more opportunities than before of coming forward and bringing themselves to the notice of the Judges and showing the stuff they were made of. In various ways, therefore, the profession might be truly gratified with what had passed during the year. And then, at that evenings's gathering, they had had the pleasure of listening to a very learned lecture by Mr K. Srinivasa Iyengar. This was a departure introduced by Mr. Sundara Iyer last year. He had always felt some doubt as to whether the proper place had been allotted in the programme for such lectures. It had occurred to him that such learned discourses were not quite the thing when their minds had been unstrung by the very pleasing entertainment provided for them. It was perhaps better to have begun the order of the day with the learned lecture. At any rate, it is a suggestion which he should like to make with a view to its being adopted, if found suitable, next year, whether they might not begin the day's proceedings with a learned lecture on some legal topic and then wind up with the entertainment. It was also worthy of consideration whether they might not arrange for a series of papers being read and for a whole day or for a good part of the day being devoted to this annual gathering. They,

had not made any attempt this year of inviting any of the Mofussil associations. The Vakils' Association had made some attempt to bring about an affiliation of the Associations in the Mofussil, but as yet Mofussil Associations had been rather shy of the process of affiliation. He hoped that in the near future they would have more of these Associations affiliated with the Madras Association. He hoped that the influence of the Association would be more extended and more beneficial in the future, and that it would bring under its control and influence a number of these Associations. He would conclude by proposing a hearty vote of thanks to their host, Mr. Ethiraja Mudaliar, for the kind entertainment provided for them and enabling them to pass such a pleasant evening.

***

The Seven Ages of a Lawyer.—The following verses by Mr. K. Ekambarayya, B.A., B.L., were recited by him at the Vakil's Gathering:—

The legal world is also a stage;
And the lawyers are but actors—for others.
They have their minor and their major roles,
And one lawyer in his time plays many parts,
His acts being seven ages. At first, the devil
Toiling and moiling in his master's chambers;
Then the briefless junior with his tattered gown
And helpless, hopeless, face, creeping unwilling
From court to court. And then the senior
Paying—measured compliments, with soured abuse
And scorn for the devilish work. Then the leader
Full of strange schemes to cleanse the profession
Jealous of its honor and quick to crush for a fault
Seeking of title and place but what is thrust
To spite the crowd. And then the acting Judge,
Silver stick in front and four thousands a month;
Courteous and kind and pleasing high and low;
Awaiting confirmed bliss and judicial rest:
And so he plays his part. The sixth age shifts
And finds him firmly set, a mighty mass
——Of experience with wrinkled wisdom grave
A hundred thousand disposals to his credit
Accustomed, now to hear without exertion

With fingers' ends dispensing—Justice
And counting the years and months. Last scene of all,
That ends this strange and splendid history
Is titled ease in dark oblivion
Sans work, *sans* rest, *sans* golden linksto life.

***

Madras Small Cause Court Rules, 1910 :—Under S. 9 of the Presidency Small Cause Courts Act, 1882, as amended by the Presidency Small Cause Courts Act, 1895, it is hereby ordered that the following rules and forms shall be observed and used by the Small Cause Court of Madras, and that the Rules of Procedure and Practice now in force in the said Court shall be varied as hereinafter mentioned :—

1. These rules may be called the Rules of the Small Cause Court, 1910, and shall come into force on the 1st day of January 1910, and shall apply to all proceedings thereafter to be instituted and so far as may be to all proceedings then pending.

2. *For* rule 5 *substitute* the following rules :—

"5. Subject to the direction of the Chief Judge the Registrar shall have power to hear and dispose of the suits and interlocutory applications and matters, and to do the acts and things hereunder mentioned :—

(1) Applications for second and further summonses, and concurrent summonses, and the substituted service of summons.

(2) Applications for the withdrawal of suits before service of summons, or where a defendant does not appear.

(3) Applications for the appointment of a guardian-*ad-litem* of an infant or lunatic defendant.

(4) Passing decrees upon admission or by consent.

(5) Passing decrees under chapter 36 of the rules when leave to appear and defend has not been obtained and the value of the suit does not exceed Rs. 500.

(6) Recording compromises and ordering refund of half costs under section 73 of the Principal Act.

(7) Passing orders under section 30 of the Principal Act and rule 174 of the rules.

(8) Applications for payment of money out of Court.

(9) Applications for the issue of commission to examine witnesses.

(10) Taking security in any suit or matter."

"5-A. The following acts and matters shall be deemed to be non-judicial and quasi-judicial acts within the meaning of section 33 of the Principal Act:—

(1) Issuing summons and fixing the returnable date thereof.

(3) The issue of summons or notice to a party for service at an address other than that given in the plaint.

(3) The transmission of summons or notice to a local Court for service.

(4) Authenticating powers-of-attorney.

(5) Executing commissions for the examination of witnesses issued by other Courts."

3. *Strike out* rules 46 and 47 and *substitute* the following rule:—

"46. All plaints, written statements, affidavits, applications, and other proceedings presented to the Court shall be written or type-written or printed, fairly and legibly, on substantial white foolscap folio paper, with an outer margin 2 inches wide and an inner margin about 1 inch wide, and separate sheets shall be stitched together bookwise. The writing shall be on both sides of the paper and numbers shall be expressed in figures.

"All plaints shall be in accordance with Form No. 2, and shall be docketed in accordance with Form No. 2-A of the schedule to these rules.

"A plaint and the first proceeding filed by a defendant shall state the address for service of the party filing at which service of notice or process may be made on him.

"All proceedings presented to the Court shall be docketed with the name of the Court, the number of the suit, a short

cause title, the description of the document, and the name of the pleader of the party presenting it, if any.

"Any proceeding which does not comply with the foregoing provisions may be returned for amendment or rejected."

4. In rule 54 *strike out* the words "unless the Court by reason of the length of the plaint" and the following words to the end of the first paragraph, and *substitute* therefor the words "except in suits on negotiable instruments, bonds or promissory-notes wherein he may present a like number of concise statements of the nature of the claim made to be endorsed on, or annexed to the summons."

5. *Strike out* rule 89 and *substitute* the following:—

"89. The following notices and processes may be served by the pleader of the party, or his clerk duly registered in the office of the Resistrar of such pleader upon the person to be served or his pleader or other recognised agent, if any, namely:—

(1) Notice of an application for the adjournment of a suit or matter, or to fix a day for the hearing thereof.

(2) Notice of an application for attachment of property or for arrest before judgment.

(3) Notice of an application for payment of a decree by instalments, or for stay of execution.

(4) Notice of an application for payment out of Court of any monies to the credit of a suit or matter.

(5) Notice to a party to produce any document in his possession or power.

(6) Summons to a person to give evidence or produce a document.

(7) Notice of an application for a new trial under rule 179.

(8) Any notice or process which a Judge or the Registrar shall direct to be served in the said manner.

"Service of any such notice as aforesaid may be proved by the affidavit of the person effecting the same, and a copy

of the notice served shall be exhibited thereto, or set out therein."

6. *After* rule 148 *insert*—

"Provided that when a party desires that summons shall be served on his behalf by his pleader, or by the clerk of his pleader, he shall proceed as follows :—

(1) He shall file in the office of the Registrar an application duly stamped stating the names, addresses and descriptions of the persons whom he desires to serve, together with a summons to each witness in the prescribed form, and a copy thereof.

(2) The Registrar, or such officer as the Chief Judge appoints in this behalf, shall thereupon insert in the summons and copy thereof the amount payable to the witness for his travelling and other expenses and for one day's attendance at the Court, and after signing and sealing the same, shall return the summons and copy to the party or his pleader or agent.

(3) The summons shall be served by delivering the copy and at the same time producing and showing the original summons and requesting the person served to sign the same in acknowledgment of the service and of the receipt of the sum mentioned therein.

(4) The summons signed by the person served shall then be filed in Court."

7. In rule 174 *for* the words "with the consent of" *substitute* the words "on notice to."

8. *Add* the following proviso to rule 178 :—

"Provided that it shall be competent to the Court, for sufficient cause, and upon such terms as it shall think fit to extend the time for making such deposit or for giving such security as aforesaid, for a further period not exceeding 14 days."

9. *Cancel* rule 225 and *insert* the following rule:—

"225. (1) If the property be moveable property in the possession of the judgment-debtor, other than the property mentioned in the first proviso to rule 220, the attachment shall be made by the officer of the Court declaring that the property pointed out to him by the judgment-creditor, or other person who on his behalf has accompanied the officer for his purpose, is attached under the process of the Court. Thereupon the judgment-creditor or such person as aforesaid shall forthwith cause the property attached to be removed, under the superintendence of the officer of the Court and delivered to the Nazir of the Court, who shall keep the same in the Court store-rooms and shall be responsible for the due custody thereof.

(2) The costs and expenses of the removal of the attached property and delivery to the Nazir may be paid by the judgment-creditor or other person on his behalf in the presence of the Nazir who shall then certify under his hand the amount so paid and whether the same is a reasonable charge. The amount so certified may be allowed by the Court as part of the costs of execution.

(3) If at the time of attachment the office of the Court is closed or the judgment-creditor is for any other reason unable to remove and deliver the attached property to the Nazir forthwith, the attaching officer may engage one or more watchmen to take charge of the property and shall be responsible for the due custody thereof until it can be delivered to the Nazir. The expenses of such watchman, not exceeding As. 4 a day, shall be paid by the judgment-creditor, and may be allowed by the Court as part of the costs of execution. The attaching officer shall, in each case, report to the Nazir the circumstances which necessitated the employment of a watchman, and the amount paid by the judgment-creditor.

(4) If the judgment-creditor fails, within a reasonable time after the attachment of any property, to cause the same to be removed and delivered to the Nazir as aforesaid, the attaching officer shall make an endorsement to this effect upon the warrant and forthwith return it to the Court, and thereupon a Judge or the Registrar may release the property from attachment.

(5) Upon the application of any party, and upon payment by him of the necessary expense not exceeding As. 4 a day for each watchman, the Registrar may direct that the attached property shall not be removed for a specified period but shall remain in the custody of one of the bailiffs of the Court, and may also direct that such bailiff shall be at liberty to employ one or more watchmen.

(6) If the attached property is subject to speedy and natural decay or deterioration, or is livestock, or the expenses of keeping it in custody may exceed its value, the Registrar may direct it to be sold at once.

(7) If the judgment-creditor incurs any such expenses as aforesaid in the removal from custody of the attached property, the particulars thereof shall be verified by an affidavit, which shall be filed together with any certificate received by him under sub-rule (2) upon any application with respect to the proceeds or costs of execution."

10. In rule 229 *strike out* the words "Judge of the Court which passed the decree sought to be executed" and *substitute* "the Registrar or such officer as the Chief Judge appoints," and *strike out* the words "from which it was sent."

11. *After* rule 269 *insert* the following sub-rule :—

"(2) Every warrant shall also state the monthly allowance payable for the subsistence of the judgment-debtor if committed toprison."

12. *Strike out* rule 271 and *insert* the following rule :—

271. (1) If a judgment-debtor is committed to prison, the Judge or the Registrar shall fix the monthly allowance payable for his subsistence during imprisonment in accordance with the prescribed scale, or if there is none applicable, according to his rank and position, and the judgment-creditor or some person on his behalf shall accompany the officer entrusted with the warrant of commitment to prison and shall pay to the officer in charge of the prison so much of such monthly allowance as shall be proportionate to the portion of the current month unexpired at the date of the said warrant.

(2) Subsequent payments of the said allowance shall be made by the judgment-creditor to the officer in charge of the prison by monthly payments in advance before the first day of each calendar month.

(3) If at the time of arrest it is not possible to bring the judgment-debtor before the Court forthwith, the judgment-creditor or other person who on his behalf has accompanied the officer entrusted with the execution of the warrant, shall accompany such officer to the Civil Jail and shall pay to the officer in charge of the prison so much of the monthly allowance specified in the warrant as shall be proportionate to the portion of the current month unexpired at the date of the arrest; and thereupon the officer in charge of the prison shall retain the judgment-debtor in his custody until he can be brought before the Court. Provided that upon payment of his charges not exceeding the sum of As. 8 per diem, the officer entrusted with the execution of the warrant may retain the judgment-debtor in his custody in the debtor's house or elsewhere until he can be brought before the Court.

(4) If the judgment-creditor or some person on his behalf fails to accompany the officer entrusted with the execution of the warrant to the prison, or to pay the amount mentioned in the preceding sub-rule, the officer in charge of the prison shall sign an endorsement to that effect upon the warrant which shall forthwith be returned to the Court by the officer entrusted therewith; and the judgment-debtor shall be released from arrest."

13. In rule 319 *for* the words "Government Pleader in any Court" *substitute* the words "Government Solicitor" and *strike out* the words "For any Court," and the words "issuing out of such Court."

* * *

Solicitors and the Bench.—One interesting fact to be noticed in connection with the appointment of Sir S. T. Evans as President of the Probate, Divorce, and Admiralty Division is that it forms an addition to the list of Judges who have commenced their professional careers as solicitors. There have been two Lords Chancellors—Lord Macclesfield and Lord Truro—who practised as solicitors. Lord Truro, on receiving an address from over five hundred of the leading solicitors in the

country congratulating him upon his elevation to the Woolsack, replied that, as exemplified by his own career, the humblest member upon the roll of attorneys was not excluded from the highest honours of the State. In more recent years, Lord Russel of Killowen, Lord Field, Lord Justice Lush and Mr. Justice Manisty have proved how solicitors may ultimately win an honoured place on the Bench. The new President of the Probate, Divorce and Admiralty Division is not alone among the existing occupants of the Bench in demonstrating the same agreeable truth. Mr. Justice Swinfen-Eady practised as a solicitor before he began his distinguished career at the Bar.—*The Law Journal.*

***

Traumatic Neurasthenia : A legal definition.—A Doctor, in giving evidence at the Shoreditch County Court on Monday as to the injuries received by a lady in an accident, said that she was suffering from traumatic neurasthenia. Counsel : That is nervousness induced by the excitement of a pending action? The Doctor: Yes; that is about it. Counsel: But that disappears when the action was over, does it not? The Doctor: Ah, that depends on the result! Counsel: I will not prophesy as to that.—*The Law Journal.*

***

The new Solicitor-General.—Mr. Rufus Isaacs, K.C., M.P., who has been appointed Solicitor-General in the place of Sir S. T. Evans, has occupied for several years a pre-eminent place among the lawyers on the Liberal side of the House of Commons, and his appointment as a Law officer is not less popular in the legal world than in political circles. A son of the late Mr. Joseph Isaacs, a member of a London firm of produce merchants, the new Solicitor-General, who was born on October 10, 1860, was educated at University College School at Brussels, and at Hanover. His career has been versatile as well as distinguished. Soon after the completion of his school, days, having resolved to go to sea, he obtained a berth as "boy" on a Scottish vessel, the *Blair Athol,* trading to Rio de Janeiro with coal.

A year or so later he took up his residence in Magdeburg as agent for his father's firm, and this position he occupied for about 2 years, gaining a useful knowledge of mercantile life. Subsequently he became a member of the StockExchange, and

his comparatively brief experience as a stock-broker must, like his earlier knowledge, have often stood him in good stead at the Bar. Mr. Rufus Isaacs, who was a pupil of Sir John Lawson Walton, was called to the Bar at the Middle Temple in 1887, and joined the Northern Circuit. Eleven years later, when he was thirty-seven years of age, he was appointed as Q. C. At first his work as a leader was chiefly in the Commercial Court. Here Mr. Justice Walton, then the leader of the Court, was his 'principal opponent.' It was in 1900, when Sir Edward Carson, having been appointed Solicitor-General, was debarred from private practice, that Mr. Rufus Isaacs attained that commanding position at the Bar which his rare combination of gifts as an advocate has enabled him to maintain with so much distinction. His active political career began in 1900, when he unsuccessfully contested North Kensington.

Four years later, at a by-election caused by the retirement of Mr. Palmer, he was returned for Reading, for which constituency he continues to sit.—*The Law Journal.*

* * *

On Sir John Bighams' Farewell.—"I am not going to make a tragedy of the occasion," said Sir James Fitzjames Stephen when he quitted the Bench. The same words might aptly have been employed by Sir John Bigham when, in happier circumstances, he bade the Bar farewell. His unaffected but dignified words justify the hope that he will be able to continue in the House of Lords the useful and distinctive part he has played in the administration of justice in the Royal Courts of Justice. In taking a formal leave of the Bar, the ex-President of the Probate, Divorce and Admirality Division has followed an old practice which has fallen into disuse in recent years. No such ceremony had occurred in the Courts since the late Lord Esher bade the Bar farewell upon his retirement thirteen years ago. Characteristically buoyant and interesting were the opening words of the venerable Master of the Rolls' valedictory address :—

My dear Attorney-General and all of you here:—I have had some difficulty in coming to a determination as to the character in which I was to address you. I am no longer a Judge, and I hardly, for a time, was able to determine what I am. I am still one of you, as I think I am a Sergeant-at-Law. I am a barrister of more than ten years' standing. I am capable of being appointed a

County Court Judge or to sit as a Commissioner to hold an Assize. I am, therefore, now what I have always tried to be, and what I have always tried to make you feel that I was during the whole time I was a Judge—namely, one of you, and only one of your equals. It is truth it on the Bench, when I was in the position of an officer on the quarter-deck, I had and was obliged to give occasionally words of command, but the moment one leaves the deck one is nothing but a fellow-officer; and I have been nothing but a fellow-barrister with you always.

Vice-Chancellor Bacon and Lord Field are the only other Judges who have taken a ceremonious leave of the Bar within the memory of most of its members. Sir Edward Fry initiated what Sir Frances Jeune called the 'pleasant custom' of holding a reception in the hall of his inns when he retired from the Court of Appeal, but Sir Gainsford Bruce is the only member of the Bench who has followed his example, most of the Judges who have retired in recent years having been content to quit their occupation on the Bench with what Lord Brampton was pleased to call a 'simple bow'.—*The Law Journal.*

***

On Taking Leave of the Bar.—It can scarcely be said that the utterances on these occasions, either on the part of the retiring Judge or the Attorney-General, reach a very high level. Perhaps the most noteworthy is that of Sir John Rolt when, as Attorney-General, he paid a tribute to Sir William Erle on his retirement from the Chief Justiceship of the Common Pleas. It is worth recalling as the finest compliment a Judge has ever received from the spokesman of the Bar:—

My Lord:-We all feel and desire to acknowledge that under your presidency in this Court the great judicial duty of reconciling, as far as may be, positive law with moral justice has been satisfied. Learning, great experience of affairs, wise administration have been so combined that, with the assistance of the eminent Judges associated with you on that Bench, the laws of England have been exhibited in their true aspect as the exponents of the rights and duties of our citizens and the guardians of their liberties. The Court of Common Pleas, under your presidency my Lord, has obtained the highest confidence of the suitor, the public, and the profession. Our homage is due and is paid not only to the dignity of the Judge but to the worth of the man, his simplicity and elevation of character, his private and social virtues, his kindness and his courtesy.

Lord Brampton has recorded his belief that these formal leave-takings are wanting in dignity—a belief which did not prevent him from printing in his 'Reminiscences' the eulogistic letters he received from members of the Bar when he brought his judicial career to a close. They at least serve, however, to demonstrate how intimate are the relations between the Bench and the Bar; and from this point of view, if from no other, it may be hoped that the agreeable practice followed by Sir John Bigham will not be discontinued, at any rate by those Judges whose ability and personality enable them to fill a conspicuous place on the Bench.—*The Law Journal.*

* * *

Sir John Bigham's Farewell.—In the Probate and Divorce Court, on Monday morning, Sir John Bigham bade the Bar farewell. Lord Gorell, his predecessor in the office of President of the Probate, Divorce and Admiralty Division, and Sir Samuel Evans, his successor, were both present at the ceremony, the other Judges present being Mr. Justice Bargrave Deane, Mr. Justice Lawrance, Mr. Justice Channel, Mr. Justice Phillimore, Mr. Justice Bucknill, Mr. Justice Jelf, Mr. Justice Hamilton and Mr. Justice Swinfen-Eady. A large number of members of the Bar were present, with the Attorney-General (Sir W. S. Robson, K. C., M. P.) and the Solicitor-General (Mr. Rufus Isaacs, K. C., M. P.) at their head.

SIR JOHN BIGHAM'S SPEECH.

Sir John Bigham said:—Mr. Attorney: I must thank you for the trouble you have taken in coming this morning to hear the few words I have to say by way of farewell to my friends at the Bar. I must also thank my successor for his kindness in allowing me to say them from his seat in this Court. It was in 1867 that I entered the Chambers of Mr. Charles Russell, as he then was, to prepare for the profession which I was to follow, and it was in 1870, just forty years ago, that I was called to the Bar by my Inn. Of these forty years thirteen were spent as a junior, fourteen as a leader, and nearly thirteen have been spent on the Bench. They have been years of strenuous work; I think I could count on my fingers the number of days I have been away from my duties on the Bench from ill-health or other cause, but now, at seventy years of age, I am tired—not so tired that I feel unfit for any more work, but tired

enough to make me feel that, in justice to myself, I ought to relax the strain of daily work on the Bench. I hope and believe that I shall be able (I shall certainly be most willing) to do useful work elsewhere in the public service, and this notwithstanding the ominous assurances of my friends that I grow younger every day. So much for myself. I turn to a pleasanter topic. I am here to thank my friends for untold kindnesses. But first I should like to record a tribute of respect and affection for those who were my friends and who have passed away—for my old master, Charles Russell, and for my casual friend, Lord Esher. They were both of my circuit, and their kindness to me and the assistance they afforded me in my younger days are never to be forgotten. Also for Lord Coleridge, whose help and sympathy, I had down to the last moments of his life, and for many others, some of whose names your memory will be able to recall. In our busy present we are apt to forget our past and those who have helped to make it for us. I wish to thank my colleagues on the Bench for their kindness to me in all circumstances. All of them were at times my companions at the Bar, and the friendships there commenced have never been broken. Nor are they, I hope, to be broken now. In particular I wish to say one word about my colleague in this Court—Mr. Justice Bargrave Deane. I came here a stranger to the work and to the practice, and I do not know what I should have done if it had not been for his kind and generous assistance. I went wrong at times, but never when I took the trouble to consult him. I wish also to thank the officials who have served me so well in the different Courts in which I have sat from time to time. For instance, those in the Chancery Division, where I once spent a whole term mainly endeavouring to solve the mysteries of Equity, and those in the Railway and Canal Commission and in the Bankruptcy Court in both of which tribunals I sat for several years; and particularly I would like to thank the Registrars and others in the Probate and Admiralty departments of this division of the High Court, all of whom have striven to make my work easy for me, and, with perhaps doubtful success, to keep me on the right course. I must not forget those I met on the circuits which I have visited. They always had a welcome for me.

My first circuit was the Western. I think it was early in 1898. I was entertained at a banquet in Winchester in royal fashion

The entertainment was in a sort of vault or subterranean passage—now gone—but the warmth of the welcome quickly dispelled my dampness of the physical surroundings, and we were very happy. It was followed by many similar kindnesses on other circuits. I must, moreover, bear testimony to the uniform courtesy of the reporters. The Press is a great power, but I am glad to say its power has never been misused in reference to myself. Indeed in the last few days kind words have been written of me in places where I least expected them. Of course, my judicial acts have been criticised, and often adversely, and perhaps rightly. But no Judge should complain of criticism, for a Judge who is never worth criticism is probably never worth anything at all. I am reminded of a conversation I once had with Lord Watson. It took place a long time ago, when I was more outspoken than I ever venture now to be. I told him I thought he interrupted counsel's arguments too often with his criticisms. 'Eh, mon,' he answered 'you should never complain of that, for I never interrupt a fool.' And so it is with a Judge and the Press. There is one person to whom on this occasion I undoubtedly ought to refer. It is my clerk. Thirty years of faithful service from him has helped me most materially during my career, and I thank him for it with all my heart. I ought also to say a word in recognition of the help accorded me in all circumstances by the other branch of the profession—by solicitors and managing clerks alike. I speak of them from a very long acquaintance. There is no finer body of men in the world. Their work is hard, responsible, and not too well paid, and the rewards they get are few and far between. And now, Mr. Attorney, I come to my last words, and I scarcely know how to speak them. They are words of deep and sincere thanks to the great Bar of England whom you represent—thanks for kindness and consideration such as surely few other men have ever received. I can say with truth that I have never quarrelled with any of you, but I may nevertheless have given offence. If so, let me now ask forgiveness and atone. I have loved my circuit and my profession, and I shall continue to love them. Their interests shall still be my interests, and their welfare shall always be in my thoughts. To every one of you I wish, with all my heart, work, success, prosperity, and happiness. And so farewell.

THE ATTORNEY-GENERAL'S REPLY.

The Attorney-General said.—My Lord : Your Lordship's feeling words of farewell to the Bar, to which you once belonged and which you once adorned, cannot fail to evoke many friendly and sympathetic memories in the minds of us all. There are those of us sitting here in the row behind who remember your Lordship in the times to which you have just referred and the times when you were a distinguished junior ; and then we remember your Lordship as the foremost pleader on the greatest of our circuits ; and we remember, and will always remember, your Lordship as one who commanded the respect and enjoyed the personal friendship of his professional brethren. Your Lordship has said that the Bar are keenly critical. They are not censoriously critical, but, as indeed you have reminded us, they sometimes extend their criticism even to those before whom they have practised. It is a fine record which your Lordship is able to show, that under this criticism, and notwithstanding this criticism, you have been accompanied in every stage of your career by the esteem and friendship of the English Bar. I should not like to speak of that career in the past tense. Your Lordship has claimed perhaps the right to feel somewhat tired after a life of such strenuous labour. The Bar take, perhaps, a more hopeful view of your Lordship's strength than you have just expressed. We hope, and we believe, that your Lordship will find refreshment from that fatigue in a change of work, as indeed you have indicated that you will, because this farewell is after all a farewell only of your Lordship in these Courts. I must not forget that it was my duty and privilege on behalf of the Bar to tender our congratulations upon your promotion to the highest of all Courts. We are particularly glad—here I speak, I think, for a larger body than the Bar, I speak for the commercial classes of England—that your Lordship's long, I will not say unique, experience which was shared indeed by your learned predecessor, an experience which is rare, in the commercial law and practice of this country, is not likely to be lost on the Bench. Commercial law is a part of our system of jurisprudence which is justly a pride to the whole country ; but it is not to be found in clean-cut codes which any academical amateur thinks he can administer ; its foundations are well and truly laid by a long series

of decisions by Judges who, I think, were none the less jurists because they familiarised themselves, as your Lordship has done, with the daily course of mercantile affairs—in fact, one might say with the very spirit of business. Your Lordship came to your work in the Commercial Court with that initial advantage; you have had it also in dealing with the not inconsiderable body of commercial work which has arisen in this Court, and it enables us to remember with pride the soundness of your Lordship's decisions, and also to say how much that personal knowledge of business life which your Lordship possessed has always facilitated the despatch of business by your Lordship. I think it would be inappropriate if I did not say one word on behalf of the Admiralty Bar of this Court upon a matter which perhaps the public may not so clearly appreciate as they, and that is to express their appreciation of the way in which your Lordship during the short time that you have sat here, troubled to master all the technicalities of the work. This Court may be assisted—it is well assisted—by assessors and by the Bar, but nothing can relieve the Judge of the Admiralty Court from acquiring a knowledge—a technical working knowledge—of the great mass of detail belonging to a somewhat particular and somewhat difficult trade. Your Lordship has mastered that with the most striking success. The Admiralty Court is almost more than a national Court, it may be called an international Court; certainly it has an immense amount of business directly with foreigners; and it is a great satisfaction to us, as English barristers, and also as Englishmen, that under the great Judges who have presided in that Court, of which your Lordship was the last, the procedure of the Court and its decisions have given such world-wide satisfaction. I am sure that happy situation has lost nothing during your Lordship's tenure of office; I am sure it will lose nothing during that of your successor. With regard to the other branches of this great division, the public can judge, and I believe the public highly appreciate, the way in which your Lordship has conducted the business. I think I may speak on their behalf as well as on behalf of the Bar in wishing your Lordship farewell. I wish also that your Lordship may have a long life to enjoy, well earned honour, and fewer responsibilities.

—*London Law Journal.*

Administrative Bodies and the Law.—There is nothing more disquieting to the thoughtful citizen than the growing evidence of a desire on the part of some politicians to substitute the arbitrary discretion of administrative bodies—committees, boards, rotas and individual authorities—for the even-handed justice of the law. The old truth that the security of the community and of every one of its members depends on the upholding of the power of the law—*salus populi suprema lex*—is now challenged and frequently set aside by the new theory that it is the proper object of Government to 'eliminate the lawyer,' to put institutions above or outside the law, to exclude the control of the Courts, to reduce the authority of the Judges, and to magnify that of civic bodies and officials. As was once said of a very different object, 'the power of administrators has grown, is growing and must be diminished.' Fortunately, our judicial Bench is still strong enough, and its great traditions have yet sufficient vitality in them to supply the needed check to the grosser excesses of the new authorities, and the power of the people exercised through their permanent Judges is still greater than that of the nominees of parties who work in turn, but only for a space, the machinery of the State. There have been many proofs lately of the advantage—nay, of the necessity—of this control. The judgments of the Master of the Rolls and of Lord Justice Farwell and Lord Justice Buckley in the Swansea School case (*Rex* v. *The Board of Education*: *Ex-parte the Managers of Oxford Street School, Swansea*), to which we refer more particularly in another column, serve to illustrate the growing danger, and at the same time to emphasise the importance of the judicial check which has never been more fearlessly applied and vindicated. A department of State—the Board of Education—has been visited by the public censure of the Judges for a dereliction of its duty, moved by political views or considerations, and this of a character 'so perverse' as to justify the exercise of the Court's highest powers, the issue of a *mandamus* to the Board directing it to exercise the jurisdiction entrusted to it 'according to law.' Such questions have risen before—*e.g.*, in *Regina* v. *St. George's, Southwark*, L. R. 19 Q. B. Div., where Lord Esher, then Master of the Rolls, laid it down that "if people who have to exercise public duty by exercising their

discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion then in the eye of the law they have not exercised their discretion." But it is a new thing that the example and the methods of vestries should be taken up and followed by a great Department of State; and the delimitation of the powers vested in such authorities becomes of vital importance in these latter days when so many Acts of Parliament refer questions involving great public, as well as private, interests to some Government Department. 'Such a Department,' said Lord Justice Farwell in delivering his weighty judgment against the Board of Education, 'when so entrusted becomes a tribunal charged with the performance of a public duty, and as such amenable to the jurisdiction of the High Court within the limits now well established by law * * * Such a tribunal is not an autocrat free to act as it pleases, but is an inferior tribunal subject to the jurisdiction which the Court of King's Bench for centuries, and the High Court since the Judicature Acts, has exercised over such tribunals.' These are words which deserve to be written up in letters of gold on the portals of every Government Department and of all the lesser bodies which have been endowed with some share of judicial authority by the wisdom of Parliament.—*Ibid.*

***

The Detention of Sekgome.—The Court of Appeal has dismissed the appeal from the judgment of the Divisional Court in *Rex* v. *Earl of Crewe* discharging a rule *nisi* for a writ of *habeas corpus* to bring up the body of Sekgome, late Chief of a tribe in the Bechuana Land Protectorate. The ground which the Divisional Court has adopted for dismissing the appellant's contention was that by the Habeas Corpus Act of 1862 (23 Vict., C. 20) no writ of *habeas corpus* may issue out of England by authority of any Court into any colony or foreign dominion of the Crown where there is a lawfully established English Court of justice which has authority to issue the writ. Previous to the passing of that statute the Courts at Westminster were in the habit of issuing a writ of *habeas* to go to any place under the English dominion wherever a subject of the Crown was alleged to be illegally imprisoned; and the Act was passed because of the discontent caused by *Anderson's case*, 1860, where a writ was sent to bring up a

prisoner from Canada. Lord Justice Vaughan Williams, however, held that the Act only applied to the territorial dominions of His Majesty ; that the Bechuana Land Protectorate, though under the foreign jurisdiction of the Crown, was not part of the territorial dominions ; that there was no evidence of the existence of a local Court which could enforce execution of the writ, and that, therefore the rule for a *habeas* could not be discharged on this ground. He, however, upheld the discharge of the rule on two other grounds, *viz.*, that the detention was made by a valid proclamation issued in accordance with the Foreign Jurisdiction Act, 1890, and that, whether or no the Foreign Jurisdiction Act empowers the Crown to issue proclamations affecting the rights of natives as well as of British subjects, the detention was justified as an act of State. Sekgome is held prisoner by a proclamation which provided that no writ or process whatsoever calling into question the legality of the arrest or detention should have any effect within the Protectorate. If therefore the Court of Appeal is right in holding that the proclamation is valid and binding, it would seem that the ex-chieftain cannot vindicate his personal liberty by obtaining a writ of *habeas* either in this country or in the Courts of the Protectorate. It was, however, pointed out that an appeal would lie to the Privy Council from any refusal of the Local Court to issue the writ, and as it is clear that the gravest constitutional questions are involved, it is to be hoped that either this procedure will be followed or that an appeal against the present decision will be taken direct to the House of Lords.—*Ibid.*

***

The Camera in Court.—Some four years ago, while Lord Gorell was President of the Divorce Court, an order was made forbidding the practice of sketching in that Court. The ground on which the order was made was that the practice, by making witnesses more self-conscious and nervous than they otherwise would be, interfered with the due administration of justice. While the more ostentatious work of the artist has thus been stopped in the Divorce Court, the less apparent operations of the photographer have become more frequent in our Courts of justice, and the Judges might well consider whether the time has not arrived for prohibiting the use of the Camera both in the Civil and

Criminal Courts. In a newly published work on "Modern Journalism,' written by 'A London Editor,' the reasons for the prohibition are put with admirable force :—

I submit that the practice of taking pictures in court of prisoners and witnesses, plaintiffs, defendants, and even of the judges themselves, whether by photography or sketching, is one that is both highly objectionable and in direct opposition to the high standard which British journalism has maintained. The blame rests, however, not so much with the journalist—whether in Court or the editorial office—as with the proprietors who allow and encourage the practice; but still more is it a reflection on the taste of the general public, to whom belongs the final right of choosing the tune which their paid piper shall play. In the case of a prisoner who is found not guilty it is a sufficient ordeal that his name should appear throughout the whole press as a potential criminal; but that his very portrait, taken at a time when his position is felt most acutely, should appear side by side with the police narrative, is an action calculated to cause unnecessary suffering to a man who has already suffered too much.

This is not merely a question of 'the taste of the general public'; if it were, it might perhaps be left to the proprietors of newspapers—the 'paid pipers,' as 'A London Editor' calls them. It is really a question of the proper administration of justice, and the Judges alone can deal with it effectively. They ought, following the example of Lord Gorell in regard to sketching, to prohibit the use of cameras in all Courts of Justice, and any disobedience of the order, whether by a photographer who surreptitiously takes a photograph, or by an editor who wilfully permits its publication, ought to be punishable as contempt of Court. —*Ibid.*

***

*Cross-Examining**.—The Divorce Court has one good, if not strong, cross-examiner in W. T. Barnard, K. C., and the Commercial Court another in J. R. Atkin, K. C. But it is necessary to make a selection, and I have done so to the best of my ability, taking a counsel to a type.

Let me begin first with Sir William Robson, the Attorney-General and leader of the Bar of England. Now Sir William Robson's reputation as a barrister is not due to the man in the street.

---

* Continued from page 159, (last part).

Scarcely any prominent barrister has been seen less in sensational cases, but the estimation in which he is held by his brethren is of the highest kind.

What are the methods?

Let me illustrate my meaning.

Many years ago a woman was charged at the Assizes with the murder of her child.

She was defended by a then well-known Q. C.

The witnesses for the prosecution, although they proved finding the body of the child in the prisoner's hut, could not establish that the prisoner ever had a child, much less the child in question, and there was practically no evidence against her.

But her counsel anxious to make assurance doubly sure, cross-examined the last (police) witness, so as to gain the jury's sympathy with the prisoner.

He asked: "You know the prisoner was badly treated by a young man?"

"Yes, he broke off the engagement when he heard she was a mother."

The damning fact had been brought out by her own counsel, and the prisoner was convicted and subsequently hanged. This common mistake of asking too much or not leaving well alone, is characteristic of what Sir William Robson does *not* do.

His cross-examination, delivered in kindly tones, goes direct to the point and stops there.

He is a cross-examiner of the astute type, knowing exactly when to begin and when to leave off.

Latterly his official position has rendered his opportunities in the Courts few and far between, but when he practised regularly in the Law Courts, there were few counsels who could administer a more searching cross-examination than he.

And he was always so pleasant withal in his rapier work that he commanded the sympathy of the very persons he was out to destroy.

Sir Edward Carson is one to be feared by the other side.

Mr. Shee was asking the witness to be circumspect in his replies, when Sir E. Carson interrupted with the remark:—

"You are very much afraid of your own witnesses."

Mr. Shee: "I'm very much afraid of you."

This excerpt from a newspaper report shows the manner of cross-examiner Sir E. Carson is.

Let us take a look at the man himself.

Tall, thin, angular of body, his face of the hatchet type, he is a striking and handsome personality of "*la beaute du diable*" description.

Although an Irishman, his movements are "icily regular," his demeanour cool to the extreme of frigidity.

A witness is in the box. Sir Edward—to quote *a bon mot* referable originally to Sir John Karslake—rises at great length to cross-examine.

He speaks deliberately, slowly, and softly in Irish accents.

"Do I understand, sorr, that you deny the story of the plaintiff?"

"In the main, av coorse; I am only dealing with essentials," and so on.

It is dull; in fact, nothing can be more depressing than Sir Edward's method. It is as depressing to the onlooker as it is serviceable to his client.

Some time ago I went into a court to hear a case in which Duke, K. C., and Sir Edward opposed each other.

This forensic combination did not of itself promise much jollity, and its promise—or rather lack of it—was fulfilled.

Duke's sombre tones had ceased to sustain life in the listless court, and Sir Edward slowly, languidly, dragged himself to his feet; then steadying himself with his right hand and turning over papers with his left, he commenced.

"I belave, sorr, that ye do not agree with Mister Smith's evidence?"

"No. It is false, every word of it. Lies, all lies!"

"I see; now tell me, sorr," turning to the jury and raising his voice, "is it thrue that you who charge my client with perjury are an undischarged bankrupt?"

The witness protested, but the judge ordered him to answer.

"It is true."

"Very well, then." His voice here dropped again. "Is it thrue, sorr, that your application for discharge was refused on the ground that you had been guilty of fraud as a trustee?"

"I—".

"Is it thrue, sorr?" (louder).

"Well, the report said so, but it was wrong."

"Thank you; that is all I have to ask," and slowly and without effort he sank down into his seat, his work completed.

Another newspaper cutting:

Sir E. Carson said smilingly: "Don't be cross with me."

Witness: "I shan't be cross with you, but don't you be cross with me."

The witness was a lady! Parenthetically I may say I have never heard Sir Edward cross-examine another lady.

She was extremely pretty, and it must have gone to the heart of any one to question her as to alleged lapses from the paths of virtue. It was one of the few occasions when he was not successful. He asked her question after question, all bearing upon the point, and he did not trouble to wrap up his questions in lavender—he never does. But to all his questions she replied quickly, briefly, and smilingly, prefacing each answer with "No or yes, Mr. Carson."—as he then was. The cross-examination lasted all day, and at the end of it the lawyer was as deadly quiet as ever, and the witness even more pleasant and attractive than she was in the morning.

I give an example of this interesting discussion.

"D'ye think, madam," he asked, "it was right of ye to allow Mr. X to take off his boots in your room?"

"Certainly, Mr. Carson. They were wet."

"But, madam, consider, Mr. X was a married man."

"I know that, but what difference did that make to his feet?"

"Madam, ye are thrifling with the coort."

"No, no, Mr. Carson; please don't say such unkind things."

"Madam, I'll again ask ye to remember that Mr. X was a married man and ye were a single woman."

"I know all that, Mr. Carson, but I can't see what that has to do with Mr. X's boots."

In the end, despite an unfavourable summing up, the lady won.

Of course, a woman has always an advantage over counsel. In the first place she is so everlastingly on the fidget that it is difficult to put any question whatever to her; in the second, she never sticks to the point and will not be kept to it; in the third place, she is a woman, and has the sympathy of the court.

If, further—like the lady spoken of—she is clever and pretty, as long as jurors are men, she must be invincible. I never heard a finer piece of work than Sir Edward Clarke, and incidentally, a "good" case.

Now to sum up. As a cross-examiner, I consider that Sir Edward Carson has no superior at the present time, and that it is arguable whether he is not greater than Charles Russell was. He has every single requisite of the art. He is faultless. Charles Russell was hot-headed and impetuous—Sir Edward is always calm and precise.

As an all-round advocate Russell was the superior, but as a cross-examiner I should prefer Carson, who may be equalled, but cannot be excelled.

And here let me make a necessary statement.

I have done my best to present to readers examples of Sir Edward's methods; but it is extremely difficult to boil down to a few hundred words a speech "in reply" which has lasted some hours, and expect it to be characteristic of the speaker.

Again, cross-examination in all but the simplest cases is an involved process.

It does not merely consist of a number of questions and answers—which more often than not in a big case are unintelligible *per se*—but its effect depends upon the facts of the cross-examiner's case, and that which he has to meet, and must be taken in conjunction with such.

In my opinion, the best work Sir Edward ever did, was in *R.* v *Oscar Wilde*, and the *Pollard Divorce case*, and these cases should be consulted.

How many times one sees it stated in a newspaper report of a cross-examination that on an objection being made to a question the judge has refused to interfere on the ground that he cannot judge whether the question is relevant until he has heard the cross-examination. That would seem inexplicable were it not for the fact that skilful cross-examination in all but simple cases depends on the weaving of the opponent's own cases into the unwilling witness's case, and is, as I have stated, to be judged from every fact and circumstance in the entire case. As an example of effective cross-examination in a simple case, I will give the following:—

A person brought an action against a railway company for damages for injuries received through falling between the platform of a station and the steps of a railway carriage, alleging that the company were negligent in allowing such a space to exist—about one foot. The case for the company was that the platform and the step were safely constructed, and that the plaintiff was himself guilty of negligence in not taking care when he left the carriage.

The plaintiff was cross-examined.

"You say you left the carriage carefully when the train was at a stand-still, and it was daylight?"

"Yes."

"Then how was it that you came to miss the step?"

"It was too narrow."

"You think it should have overlapped the platform?"

"Yes, or been nearer to it."

"Do you know that thousands of persons have used that platform daily since 1870?"

"Perhaps."

"And that the carriage with its step has been in use at that station for ten years?"

"Perhaps."

"And that no accident has been traceable to the station or the carriage?"

"Perhaps."

The next witness was a surveyor, who swore that a distance of a foot between the step and the platform was dangerous.

Cross examined: "What experience have you of railways?"

"Well I am a shareholder in one or two."

The other witnesses were left severely alone.

The jury found for the defendants. In my opinion the cross-examination in that case was perfect, and is easily understandable and for this reason. The facts were simple, and it was possible in a very short compass for the cross-examiner to put his case to the witness. It was, of course, apparent that a company could not reasonably be expected to build all their carriages so that their steps were flush with the platform of all their stations, and that the plaintiff could not have left the carriage carefully or he would have taken a firm footing on the step.

As a skilled cross-examiner of the robust type no better instance exists than Robert Alfred McCall, K.C., well—and unfavourably—known to fradulent company-mongers and the would-be defrauders of railway and omnibus companies.

" Now, Sir, isn't it a fact that every single shareholder in this company is a nominee of your own?"

"Perhaps—but—"

"Answer the question. Yes or no. You say 'Yes.' Now let me ask : Was not every pennypiece of the directors' 'qualification' found by you?"

Or in a running-down case.

"I put it to you, that so far from its being the factthat our omnibus ran into you, it was you by your gross carelessness ran into the omnibus."

Go into the courts in the Strand any day, in term time, and the chances are that you will hear one of these questions being put by McCall in his generally successful efforts to find out the truth for his client.

A man as esteemed by his brethren for his generality and straightness as feared by those seeking to do wrong is McCall.

Let me now turn to another proficient in the art in H. E. Duke, K. C., who, good in many departments of advocacy, is best in cross-examination.

As I have already hinted, Duke is a mournful person; and I hope he will not mind my saying that in court no "mute" that ever assisted in the obsequies of unavailing mortal could improve

his solemnity of demeanour. His voice especially is funereal, his delivery reminiscent of a Methodist Minister struggling with an earnest endeavour to improve an occasion.

He speaks slowly, oh, so slowly, and in a monotone. Every word receives its proper stress, every syllable its due weight. Precise in appearance, precise in utterance, he denotes those qualities which are peculiarly Anglo-Saxon, and connotes those of a successful barrister.

His method is to ask quietly the questions which, in his opinion, will shake or destroy the opposing witness. He is never elated by success, depressed by failure, or led aside by humour.

Let me give an illustration of his work—one that is easily understandable by the reader.

Mr. Brown was suing for damage for injuries, and was being cross-examined by Duke:

"I gather that you did not see nor hear the approaching vehicle?" (*N.B.*—It was a grocer's cart).

"Not I. Vy, the fust thing I see or hear was the wan a-top of me. I was being scrunched afore I knew where I are."

"I understand. You say you neither saw nor heard the approching vehicle?"

"That's right. Not I—never at all" the witness said pleasantly.

"You were overtaken opposite the the post office, I believe?"

"Yes. I was in the middle of the road."

"What were you doing that you did not see or hear the approaching vehicle?"

"Nothin—look ere."

"Answer my question please."

"Vell, but look ere, guv'nor."

"Answer my question, please."

"Nothin but avin a bit of a lark with one or two others."

"Having a bit of a lark! Dou you mean you were dancing on the pavement?"

"P'raps I was, p'raps I wasn't."

"Were not you dancing on the pavement with a young lady when the vehicle came round the corner thirty yards away?"

"P'raps I was, I says, p'raps I wasn't."

"And didn't the young lady run away from you?"

"I don't say nothink."

"And did not you run after her and so into the vehicle?"

"P'raps—"

"Answer the questions, please."

"Well what right had the cart to be there—I asks?"

"The jury will tell you. Thank you."

Collapse of plaintiff's case.

This is the method which dovetails the truth into the many untrue stories told by the witness; it does not bewilder or confuse the jury.

And here I may explain what is generally remarked as an inexplicable problem—the failure in the House of barristers who have proved successful in the Courts.

The explanation is really very simple.

In the Law Courts, clearness, conciseness, and terseness are necessary; for the aim of the speaker is to impress his views upon the tribunal, to convince it he is right.

In the House no one in his senses would try to convince any one, and the aim of the speaker is to deliver in an attractive way an *ad captandum* address, which will pleasantly interest the House and read well—when sub-edited.

This essential difference of aim and environment is the reason why Charles Russel, Finla, Bigham, Duke and Isaacs have never obtained the "ear of the house," while other inconsiderable barristers have succeeded in doing so.

It is true that Sir Edward Clarke was, and Sir E. Carson and Sir H. S. Robson are, listened to in the House, but the measure of their success is infinitesimal compared with what they have gained in the Law Courts.

And so it must necessarily be.

I have mentioned Rufus Isaacs' success in the law courts. This success is commensurate with his popularity there. He is a Jew—but, despite that barrier to favour with barristers, he is as well liked and trusted as any one to the bar. It will be remembered that recently, for some scarcely understandable reason, his unassailable position at the bar, his wealth of legal

learning, his selection by the unanimous voice of the profession to the post of Law Officer to the Crown—were weighed in the balance against the Parliamentary experience of another King's Counsel, and found wanting. This failure on the part of politicians to give honour where honour was due was regarded by the bar with amazement and resentment, qualified only by the reflection that Isaacs would still be found daily at the law courts. And let me—selfishly perhaps—express a wish that it will be a long time before he deserts the place where he has won fame, fees and affection.

Go into court and watch him cross-examining. He is brisk and loud of voice. He speaks without a lisp or a trace of affectedness—straightforwardly and pleasantly.

If the witness cannot understand the purport of his question, he explains it. "You know, I am going to try to prove that you are mistaken in your account of what happened. Now remember this, and consider your answers carefully."

There is no underhandedness about him; no saying one thing and meaning another. He is frankness personified.

By far the most attractive of all practising barristers, he is a remarkably fine advocate, a great cross-examiner. And his faults—

He is a little too lengthy, and goes rather too fully into detail, but he does not lack the fine sense of effect of Carson. As a "general," there is no one to touch him at the bar; his discretion is unrivalled.

In stock exchange and high financial cases, he is *the* advocate. His very defects stand him in good stead in dealing with the clever "City Division," for it is only by hammering away on details that a counsel can hope to shake the plausibility of a "financial expert" who has been well coached.

His genius for laying before a jury, in a concise statement, the history of transactions ranging over many years, is unquestionable. He is also one of the very few advocates who can successfully essay sentiment.

The chief instances of skilful cross-examination which are to Rufus Isaacs' credit are, without a single exception, to be

found in highly involved cases. His work in the cross-examination of Mr. Whitaker Wright extended over some days, but it is mere waste of time for me to give excerpts from that absolute masterpiece. Such would convey nothing to the reader.

Another good cross-examiner is Charles Gill, K. C., a barrister who has been evolved from a "Sessions" chrysalis. He made his reputation as a defender of prisoners. He confirmed it by becoming the best prosecutor that was ever seen in or out of the Old Bailey, and he sustains it by his "special" work there and in the High Court.

He is of cheerful habits and pleasant temper—when he has his own way—and is well up in the ways of the world!

He conducts his cases with great discretion, and his advice is generally sound. But—I hear some one ask—what of him as a cross-examiner?

Shortly, he is a good cross-examiner.

His method is of the microscopic variety and is followed by only one other prominent advocate—Montague Lush.

He dives into the merest details, takes absolutely nothing for granted; and he does it all in the manner of an earnest seeker after truth.

Some years ago I was at the Old Bailey waiting for a case to be called on and I walked into the Recorder's Court, where Gill was prosecuting a builder for stealing water. The prisoner was in the box, being cross-examined. His story was that the extra water tap was not erected by him, and that he knew nothing about it. The case of the water company was that he put up the tap secretly, and thereby took water which was not included in his rate. I stayed some little time, and heard Gill take the builder over about 5 minutes of his life. When I left, the builder had given so many versions of how he had spent that 5 minutes that I firmly believe if he had been asked if he had been born in that time he wouldn't have known what to say. The next afternoon, on my way out, I looked in at that Court again. Gill was still cross-examining the builder, who, in the end, was convicted and sent to prison.

Now—with the exception of Lush—there is no other man at the bar who would have taken the infinity of trouble necessary in that case.

Here was a builder with many taps supplying water to his premises, for all—but one—of which he paid. It was the duty of the prosecution to make out that the builder stole the water supplied to his place by that tap; in other words, that he created the tap and took the water with intent to commit a felony. A difficult task, aud so a long and minute cross-examination was necessary. Only two barristers whose existence I know of could have administered it, and one of them was Gill.

Let me turn now to another good cross-examiner of the analytical type—Horace Avery, K. C. This barrister is a strict adherent to the "silence is golden" principle, and rarely lets himself be drawn into discursiveness or any attempt at eloquence.

One of the very few "Old Bailey" advocates who have ever made themselves known outside that sessions house, he has won fame in the Royal Courts of Justice, both as a lawyer and a cross-examiner.

The questions he jerks out at a hostile witness have many merits, among which are conciseness and clearness, and he asks no question which is not relevant. With a little more pliability and a great deal more sympathy he would be a very great advocate, his lack of oratorical power being compensated by his judgment and powers of cross-examination.

As it is, however, he is worthy of being placed in these notes as a type of the shrewd, clear-headed, able cross-examiner.

If you met him in the Central Hall of the Law Courts in ordinary garb, you might imagine that he was a country gentleman who had mistaken the Courts for the agricultural hall. But—when he has donned wig and gown, and is confronting a witness, he is as fierce as a terrier in sight of a rat.

In a thin, high-pitched voice he plies the witness with question upon question, probing almost every statement to its depth and even combating his own suggestions.

Unlike Charles Gill, he adopts a menacing mien; unlike Charles Gill, he wakes the echoes with his words, and yet there is not the least doubt that he well deserves his reputation as being one of the most deadly cross-examiners at the bar.

Let me turn now to an advocate of an altogether different type—Benjamin Francis Williams, K.C., who is about the last of the old order of dramatic cross-examiners. Dramatic, humorous, searching, and gifted with a keen perception of the probabilities of the case, he cross-examines in rigorous manner, and makes his points well.

Let me give an illustration of his method. He was defending a man for murder. The case for the Crown was that the prisoner had come to the house of a witness one evening, carrying a sack ; that he had opened the sack, and showed in it the dead body of a man called Jones ; that he had said that he had killed Jones, and was going to bury the body in some waste ground. A year or so afterwards the body was found in the waste ground and the chief witness told his story.

The prisoner was arrested and the defence was that it was a concocted story and too ridiculous to believe. The cross-examination of the chief witness proceeded thus :—

"Now you have told us all about the sack and the burial, and told us that when the prisoner left your house he whistled. Do you remember what tune he whistled ?"

"I don't know !"

"Let me suggest its name. Was it 'Now We Shan't Be Long?' (the title of a then popular song).

"No."

"What! You don't know ? Well, surely, it must have been.

I need not comment further on the case ; but the prisoner was acquitted.

In closing these notes, I cannot refrain from mentioning an advocate who now only occasionally consents to appear in the High Courts of Justice—Sir Edward Clarke, K. C. During many years of his long career at the bar, there was not a time when he was not equal to the foremost advocate, and, in my opinion, his merits as a cross-examiner were of a pre-eminent order. I have not dealt with him because I have taken as my type barristers in ordinary every day practice ; but at the present day he remains what he has been for years past—a great advocate, an excellent cross-examiner, and a typical member of the Bar of England.—*Canada Law Times.*

Assignment of Part of Debt.—The decision of *Darling* J. in *Skipper* v. *Holloway* (*Times*, 15th instant), with reference to the assignment of part of a debt, appears to be the corollary of the case of *Jones* v. *Humfreys.*[1] In the latter case it was held that an assignment of an indefinite part of a future debt could not take effect as an absolute assignment under S. 24 (6) of the Judicature Act, 1873, and this was put upon the ground that the debtor was entitled to know, on receiving notice of the assignment, exactly how much he was to pay to the assignee. Where the assignment is of so much as may be necessary to secure payment of an unascertained sum, there is not this certainty; there is no absolute assignment which can be completed by notice under the statute, and the assignee merely obtains a charge on the debt. The result is the same as where a debt or an interest, under a contract, is assigned as security for the repayment of a debt due from the assignor to the assignee. This operates by way of charge only, and not as an absolute assignment—*Mercantile Bank* v. *Evans*[2] —although an assignment subject to redemption operates as an absolute assignment—*Durham Bros.* v. *Robertson.* [3] Where there is an assignment of a specific sum out of a debt, whether the debt is present or future, then the debtor knows with certainty to what extent he can obtain a receipt from the assignee, and there seems to be no reason why this should not be treated as an absolute assignment of the stated amount. In the present case, accordingly, *Darling* J. held that an ascertained part of an existing debt could be effectually assigned so as to enable the assignee, where the assignment had been completed by notice, to sue in his own name for the part assigned.—*Ibid.*

India in the English 'Law Journal'.—Seldom has a more romantic and picturesque case come before the Judicial Committee of the Privy Council than that unfolded in the petition for special leave to appeal in *T. Chinnappa Moodelly* v. *K. Kandasasamy Moodelly.* The petitioners and respondents were trustees of neighbouring temples dedicated to two Hindu Gods. It is necessary that the Gods should have suitable exercise, and special roads are dedicated to their use to

1. (1902) 1 K.B. 10, 2. (1899) 2 Q. B. 613.
3. (1898) 1 Q.B. 765.

enable them to perambulate without defilement and without interfering with each other's ambits. Should one God meet another outside his proper professional area, it is supposed that dire calamities will occur. The respondents in this case claimed to take their God—the Yellow God—in procession outside the roads in his particular ambit and along those of the petitioners' temple dedicated to the other—the Red God. The High Court of Madras, reversing the decisions of the lower Courts, granted them an injunction restraining the appellants from interfering with them on the ground that the streets were public streets and open to the use of everybody. The Judicial Committee took the same view, and dismissed the petition; the Yellow God, they held, was an ordinary member of the public, and had the right of an ordinary person to take exercise along the public roads. The case has some analogy to the famous Salvation Army case of *Beatty* v. *Gillbanks*,[1] where the principle was laid down that a person cannot be prevented from doing an innocent act merely because it gives offence to another person. But the setting of the oriental case is much the more picturesque.—*London Law Journal*.

Photography and the Law.—In the administration of the law photography has long played an important part. Plans and models have their distinctive uses in civil cases; chemical analysis is frequently of the utmost service in criminal trials, but photography, in the hands of the technical expert, is, it may safely be said, of more assistance to the administration of justice than any other art or science. Its advantages are obvious in certain classes of cases. In light and air cases, for instance there is nothing, apart from a personal view, by which the Court can obtain a clearer idea of the alleged obstruction than by a properly authenticated photograph of the buildings with which the dispute is concerned. In every action about damaged articles which cannot be produced in Court, photography is of invaluable help. The torn side of a ship damaged in a collision; the broken railings of a private house into which a motor car has run; the cracking walls of a newly erected building that suggest the negligence of the builder; the scene of the collision in a running-down case, or of an accident arising out of the

1. (1882) 51 Law. J. Rep. M.C. 117.

bad condition of the road—these are among the litigious things in which photography is obviously of the greatest use. Not less serviceable is it in the reproduction of original documents, letters, telegrams, etc. The photograph of a will at Somerset House, for instance, is immeasurably more useful than a type-written copy. It is a faithful reproduction of the document and of any corrections and marginal notes the testator may have made, and it affords a wider opportunity of testing the genuineness of the signature of the testator.

Largely as lawyers now recognise the utility of photography, they might advantageously make a more frequent use of it. Correspondence, upon which so many legal issues depend, easily lends itself to photographic treatment. This is true of all classes of litigation, from a contract case to a divorce suit. The original letters may be destroyed or stolen ; they may, by frequent handling, become torn or illegible. Photographic copies may, in the event of the originals being lost, be accepted as secondary evidence. They are, moreover, easier to handle than the originals, while enlarged photographs may be taken of letters with writing so small or careless as to be almost undecipherable. Another advantage—which belongs to photography in all the legal uses to which it is put—is that, when photographic copies are in their hands, Judge, Jury and Counsel can see simultaneously what the originals are like. Some leading firms of solicitors make it a practice, even when there is no immediate prospect of litigation, to have photographs taken of all the most important documents that come into their possession. Their example, where the issues warrant it, might well be followed more generally. No solicitor who entrusts an original document to the London Stereoscopic Company, the oldest firm of photographers in London with a special experience of technical work, need fear that his confidence will be abused. The Company, who did the whole of the photographic work in the Tichborne case, and whose services have been employed in many other notable trials, guarantee absolute secrecy. At their premises, 106 Regent Street, W., there is a separate department for technical works, under the charge of an expert operator with a special experience of photographic work likely to be of assistance to the legal profession. Photographs may, in urgent cases, be obtained on

the same day that instructions are given, and expert advice is always available as to the photographic results.

So far as the administration of the criminal law is concerned, the supreme value of photography lies in the ready assistance it renders in forgery cases. Here it is enlargement that is of special use. A forged imitation of a signature must necessarily be written slowly, while a genuine signature is generally written quickly. Usually an enlarged photograph of a forged signature shows traces of the heart pulsations of the perpetrator of the forgery. This is particularly true of capital letters with long downward strokes involving an extra pressure on the pen. So marked are these traces of pulsation in some enlargements that they have been known to constitute a conclusive proof of the want of genuineness. What is true of signatures is, of course, equally true of all documents the genuineness of which is in doubt. One great merit of a photographic copy of a questionable document or signature is that it may be so underlined and marked that its salient points leap to the eye. It admits, too, of marginal comments, which will render easier the task of those engaged in conducting and determining the case. And this is an advantage which belongs to photography in relation to all original documents, whether in criminal or civil cases.—*London Law Journal.*

***

Versified Law Reports.—Alluding to Cowper's suggestion that law reports should be in verse, the *Globe* says: "An earlier poet made the same suggestion. 'How now, Ovid ! Law cases in verse ?' inquires Tibullus in Ben Jonson's 'Poetaster,' and Ovid replies :

'Troth, if I live, I will new dress the Law
'In sprightly Poesy's habiliments.'"

Sir Frederick Pollock took these lines as his motto in writing his 'Leading Cases Done Into English.'

It is a pity, perhaps, that Sir Frederick, in his capacity as Editor of the "Law Reports" does not sometimes recall them. A judgment, say, of Lord Justice Vaughan Williams, done into verse, would give a welcome touch of sprightliness to the "Reports."

There is only one legal poet whose lines have actually been quoted in Court as an authoritative statement of the law. In

" The Tourist's Matrimomial Guide Through Scotland," written by the late Lord Neave, an eminent Scottish Judge, occur these lines :—

"If people are drunk or delirious,
The marriage, of course, would be bad ;
Or if they're not sober and serious
But acting a play or charade.
It's bad if it's only a cover
For cloaking a scandal or sin,
And talking a landlady over
To let the folks lodge in her inn."

Lord Gorell once quoted them in an English divorce case involving a question of Scottish Law.—*The Law Journal.*

***

Rising Hours of Courts of Justice.—Hours of rising each day at the High Courts of Justice are so varied (says the *Daily Telegraph*) that counsel are sometimes puzzled as to what is going to happen when 4 o'clock in the afternoon arrives. One Judge rises at 4-15 and others at 4-30 regularly, but occasionally Judges who follow the custom of commencing judicial work in the public Courts at 10-30 and concluding at 4 o'clock will decide to proceed until a later hour. In the Court in which Mr. Justice Darling was engaged on Monday, the hour of 4 had passed when Mr. Lush, K. C., looked at the clock and then at the Judge, remarking that he did not know how long his Lordship would sit. His Lordship smiled and replied: 'How long has the House of Commons decided we are to sit ?' By the side of Mr. Lush sat Mr. SIMON, K.C., M.P. 'Ask Mr. Simon,' added his Lordship. Mr. Simon smiled, but evidently thought silence was golden. He was not the only Member of Parliament present. Mr. F. E. SMITH, K.C., was there, as well as Mr. Bottomley. But these legislators ventured no opinion as to the view of the House of Commons on judicial hours of labour. Then Mr. Justice Darling continued : 'I don't know that I have got any right to sit at all. While I went to luncheon a Member of the House of Commons showed me a Bill in which I see it is proposed to the House that nobody shall sit on the Bench until he his seventy-five years of age.' Despite the wonted gravity of his Lordship, the spectators who crowded the Court

laughed heartily. Monotony of judicial routine is sometimes relieved in this Court—No. 8—by a witticism from the Bench, and the Usher exercises a rare diseretion in the use of the word 'Silence.' Those present thought that this remark of his Lordship was made in jest. Mr. Justice Darling immediately explained that this was a wrong view to take of his utterance.' I am not joking,' he added, 'and as I have not reached, by a long way, that judicial age, I don't know whether I ought to go on with this case. Perhaps we shall have to adjourn for some years.' The discussion did not proceed further, and his Lordship adjourned.—*The Law Journal.*

Contemporary Legal Literature.

In an article in the April number of the *Michigan Law Review* Mr. Gordon Stoner tries to illustrate the influence of social and economic ideals 'on Law. Referring to the fact that Judge-made law, on account of the conservatism of the Judges and the reverence for precedents, is less easily influenced than statute law by the advancing social opinion of the community, he points out that in America, where the Judges are appointed by popular election, public opinion exercises greater influence than in England even over the growth of Judge-made law. For his illustration the author takes the history of the cases on what may be called "malicious torts." From the extreme individualistic view that a malicious motive does not make wrongful an act which is otherwise not so, he sketches the development in America of the view that there is no such thing as an *absolute* right in the enjoyment of one's property or in the exercise of one's business, etc., and that where a person does an act even if it be on his own property, with the sole intent of injuring another, the person injured is entitled to damages. This devlopment of the law the writer attributes to the change in public opinion from the individualist mode of thinking to what may be called the socialistic, when the rights of the individual whether by way of enjoyment of property, freedom of contract or competition in business have come to be subordinated to what is considered necessary in the interests of society.

BOOK REVIEWS.

The Indian Constitution:—An Introductory Study. By A. RANGASAWMI IYENGAR B.A., B.L., Assistant Editor, *The Hindu*,

Published by Messrs. G. Loganadham Brothers, Madras. Price Rs. 2..—This is an useful and interesting book and has been published opportunely at a time when the new reforms are being put in force. The appendix gives some of the statutes bearing upon the Constitution and the rules made in the different provinces for election to the Legislative Council under the new statute. We trust the book will be found useful to students of Constitutional Law and history members of the legal profession, and others interested in the Indian Constitution.

The Madras Estates Land Act I of 1908, *as amended by Act IV of* 1909: BY P. DURAISAWMI AIYANGAR, B.A. B.L., Hight Court Vakil, Madras.—This is a useful commentary on the Estates Land Act. Many of the provisions of the Act have been modelled on the Tenancy Acts of other provinces. The decisions of the other Indian High Courts on these provisions will therefore be of value as throwing some light on the corresponding provisions of this Act, and the reference to those cases given by the author will be found useful. The notes are concise and brief and the author has also given references in each section to the corresponding provisions, if any, of the Tenancy Acts of other provinces. The author has in his comments given extracts from the speeches of the Members of the Legislative Council at the time of the passing of the Bill into law and although it may be useful to Revenue Officers who are not trained lawyers, we must deprecate the references to the proceedings of the Legislative Council especially when it has been held by the ultimate Court of Appeal for India that these proceedings cannot be referred to as aids to the construction of the Act: See *Administrator General of Bengal* v. *Premlal Mullick.*[1]

On the whole, however, the book will be found extremely useful to Practitioners, Revenue Officers and others concerned with the working of the Act.

The Negotiable Instruments Act: BY MESSRS. K. BASHYAM IYANGAR AND Y. ADIGA.—A good commentary on the Negotiable Instruments Act has long been felt to be a great desideratum and the authors must be congratulated in supplying this long-felt want. They have spared no pains in collecting the cases, both English and Indian, and arranging them under

1. (1895) I.L.R. 22 C. 778; L.R. 22 I.A. 107.

proper headings. The book shows an amount of research creditable to the authors. There is a feeling that Madras is behind the field in the matter of the publication of books but we think the authors have shown that it can no longer hold good and we hope that many others in Madras will follow their example. On the whole, we must congratulate the authors in producing an excellent commentary on a difficult and a rather out of the way Act.

An useful introduction is given explaining the history as to the origin of the law and the provisions of the Act. The commentaries on the sections are learned and embody much useful information and we are sure the book will be found useful by all classes of the profession in this country.

Acknowledgments.

We beg to acknowledge receipt of the following publications :—

1. A Handbook of Administration Law by Alexander Kinney, Officiating Administrator General of Bengal. Messrs. Thacker Spink & Co. Price Rs. 8.
2. The Doctrine of Absolute Privilege by Govinda Marar, B.A., B.L., High Court Vakil, Madras.
3. Evidence in Brief by V. D. Knowles. 2nd Edition. Price 2*s*. 6*d*.
4. Kerr on Fraud and Mistake, 4th Edition 1910, by S. E. Williams, Barrister-at-Law. Sweet and Maxwell, Limited, London. Price 30*s*.
5. Guardian and Wards Act by Alexander Kinney, Officiating Administrator General, Bengal.
6. International Law Directory for 1910 by P. G Kinic.
7. The Madras Estates Land Act I of 1908 by P. Doraisawmi Aiyangar, B.A., B.L., High Court Vakil, Madras.
8. Indian Penal Code by R. A Nelson 5th Edition.
9. Examination Guide to Roman Law by Messrs. Oliver and Williams, 3rd Edition. Price 10*s*. 6*d*.
10. Concise Form of Wills by J. B. Mathews. 13th Edition. Sweet & Maxwell. Price 21*s*.

Allahabad Law Journal for	April 1910,
Bombay Law Reporter	Do.
Burma Law Reporter	Do.
Calcutta Law Journal	Do.
Calcutta Weekly Notes	Do.
Canada Law Journal	Do.
Canada Law Times	Do
Case and Comment	Do.
Central Law Journal	Do.
Chicago Legal News	Do
Criminal Law Journal	Do.
Green Bag	Do.
Harvard Law Review	Do.
Hindustan Review	Do.
Kathiawar Law Reports	Do.
Law Magazine and Review	Do.
Law Notes	Do.
Law Students' Helper	Do.
Law Students' Journal	Do
Michigan Law Review	Do.
Police Service Magazine	Do.
Punjab Law Reporter	Do.
The Law Journal	Do.
The Lawyer	Do.